No. 98-1960-CFX Title: Cortez Byrd Chips, Inc., Petitioner
v.
Bill Harbert Construction Company, etc.

Docketed: June 8, 1999 Court: United States Court of Appeals for the Eleventh Circuit

Entry	Date	Proceedings and Orders
	Jun 7 1999	Petition for writ of certiorari filed. (Response due July 8, 1999)
	Jun 22 1999	Waiver of right of respondent Bill Harbert Construction Co., etc. to respond filed.
	Jun 23 1999	DISTRIBUTED. September 27, 1999
	Jul 2 1999	Response requested.
	Aug 2 1999	Brief of respondent Bill Harbert Construction Company in opposition filed.
	Aug 23 1999	Reply brief of petitioner Cortez Byrd Chips, Inc. filed.
	Sep 10 1999	Petition GRANTED. SET FOR ARGUMENT January 10, 2000. **********
	Oct 25 1999	Joint appendix filed.
	Oct 25 1999	Brief of petitioner Cortez Byrd Chips, Inc. filed.
	Nov 29 1999	Brief of respondent Bill Harbert Construction Co. filed.
	Nov 29 1999	Record filed.
	Dec 6 1999	CIRCULATED.
	Dec 28 1999	Reply brief of petitioner Cortez Byrd Chips, Inc. filed.
	Jan 10 2000	ARGUED.

Supreme Court, U.S.
FILED

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No. 98-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

CORTEZ BYRD CHIPS, INC.,

Petitioner,

v.

BILL HARBERT CONSTRUCTION COMPANY,
A DIVISION OF BILL HARBERT INTERNATIONAL, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a suit to vacate an arbitration award may be brought in the district in which the events in the underlying dispute occurred.

RULE 29.6 STATEMENT

Petitioner Cortez Byrd Chips, Inc. is not the subsidiary of any other corporation and does not have interests in any non-wholly owned subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI

Cortez Byrd Chips, Inc. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit (App. 1a) is reported at 169 F.3d 693. The opinion of the district court denying petitioner's motion to transfer (App. 8a), the opinions confirming the arbitration award (App. 5a, 11a), and the judgment (App. 18a) are unreported.

JURISDICTION

The decision of the Eleventh Circuit was entered on March 9, 1999. This Court has jurisdiction over this petition under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 9 of the Federal Arbitration Act provides in pertinent part:

> If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made.

9 U.S.C. § 9. Section 10 of the Act provides in pertinent part:

> the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration . . . .

Id. § 10. Sections 9, 10 and 11 of the Federal Arbitration Act are reprinted in their entirety at App. 19a.

STATEMENT

This case presents a fundamental question concerning arbitration procedure that has deeply divided the courts of appeals: whether the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, requires actions to confirm, vacate or modify arbitration awards to be brought in the district in which those awards were made. In the decision below, the Eleventh Circuit held that petitioner could not bring an action to vacate an arbitration award in the district in which the underlying dispute arose — as the general venue statute permits, *see* 28 U.S.C. § 1391(a)(2) — because the arbitrators chose to conduct the arbitration where respondent's business is located. This decision squarely conflicts with the decisions of at least five other courts of appeals and deepens an already widespread split among the federal courts of appeals.

1. The Federal Arbitration Act was "designed to [reduce the] technicality, delay and expense" of litigation. H.R. Rep. No. 68-96, at 2 (1924). Accordingly, in addition to making arbitration agreements "valid, irrevocable, and enforceable" contracts, 9 U.S.C. § 2, the Act provides a streamlined procedure for enforcement of arbitration agreements. Specifically, the Act requires courts to stay judicial proceedings raising any issue referable to arbitration, *see id.* § 3, and authorizes them to compel arbitration through summary proceedings, *see id.* § 4. The Act also provides a means for appointing arbitrators and compelling the attendance of witnesses. *See id.* §§ 5, 7. Finally, and most pertinently here,

the Act provides standards for confirming, vacating or modifying awards made in arbitration and indicates that applications for such orders may be brought in the district where those awards were made. *See id.* §§ 9-11.

2. Petitioner Cortez Byrd Chips, Inc. operates a mill in Brookhaven, Mississippi that produces wood chips for use in the paper making industry. App. 1a; Answer at 3. Respondent Bill Harbert Construction Company is in the commercial construction business and has its principal place of business in Birmingham, Alabama. Complaint ¶ 1; Answer ¶ 1.

On October 16, 1995, petitioner hired respondent to install a prefabricated chip mill in Brookhaven. Answer at 3. The parties executed a form construction contract providing that petitioner would pay respondent $1,357,000 for installation of the mill within 30 weeks. Abbreviated Form of Agreement between Owner and Contractor at 2 (Answer, Ex. A). The contract also provided that any additions, deletions or modifications of the work required "shall be authorized by written Change Order signed by the Owner, Contractor and Architect, or by written Construction Change Directive signed by the Owner and Architect" and that "[t]he Contract Sum . . . shall be changed only by Change Order." *Id.* at 8. The contract is governed by Mississippi law and provides that any disputes between the parties "shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association currently in effect." *Id.* at 7-8.

After the mill was installed, respondent sought an upward adjustment in the contract sum. Answer at 4. Petitioner denied any obligation to pay more than the original sum because the parties never executed a written change order as required by the contract. *Id.* at 5. When the parties failed to resolve this issue, respondent filed a demand for arbitration with the American Arbitration Association, which elected to arbitrate

the matter in Birmingham, Alabama, where respondent is located. App. 9a. During the arbitration proceedings, counsel for respondent admitted that no written change order was ever executed. Answer at 5. Nevertheless, on December 19, 1997, the arbitration panel awarded respondent an adjustment of $488,500 based upon "Change Order Number One," a calculation of seven different items plus tax and overhead. Award (Complaint, Ex. A at 1).

In response, petitioner applied in the United States District Court for the Southern District of Mississippi, the district in which it resides and the chip mill was installed, to vacate the arbitration award. App. 2a. Approximately one week later, respondent filed suit in the United States District Court for the Northern District of Alabama, where the arbitration was held, to confirm the award. App. 2a. When petitioner moved to dismiss, transfer or stay the subsequently filed action in Alabama, the court denied the motion. In an opinion issued on April 24, 1997, the court concluded that "[t]he PLACE of arbitration determines the jurisdiction of the court" and that it therefore had "*exclusive* authority to vacate, modify, or correct the award" of the arbitration conducted in its district. App. 10a. Although petitioner pointed out that the Fifth Circuit had recently rejected this conclusion in *Sutter Corp. v. P & P Indus., Inc.*, 125 F.3d 914 (5th Cir. 1997), the district court held that it was bound by an earlier Fifth Circuit decision, *City of Naples v. Prepakt Concrete Co.*, 490 F.2d 182 (5th Cir. 1974), rendered before the creation of the Eleventh Circuit. App. 9a-10a.

Petitioner moved for leave to file an interlocutory appeal, and on May 18, 1998 respondent submitted a "renewed motion" to confirm the arbitration award. Two days later, treating the complaint as an initial motion to confirm and the counterclaims in petitioner's answer as a motion to vacate, the trial court denied the motion to vacate and held that the arbitration award should be enforced because the record was

"absent a valid ground for *vacatur* or modification." App. 12a, 16a-17a nn. 1-2, *see also* App. 6a (entering final judgment on ground that "no evidence proffered to support any attack on the award").

Unwilling to return to the trial court, in the court of appeals petitioner challenged the trial court's decision solely on the ground that venue under the Federal Arbitration Act is permissive and that the trial court below should have deferred to the Southern District of Mississippi where proceedings relating to the arbitration award were first filed. App. 2a. The Eleventh Circuit noted that there is "a significant split of authority in the U.S. courts of appeals as to whether [the Federal Arbitration Act's] venue provisions are permissive or mandatory" and that "[t]he Supreme Court has never resolved this conflict." App. 3a n. 3. Finding that it was bound to follow the Fifth Circuit's decisions prior to October 1, 1981, the court of appeals held that the Fifth Circuit's decision in *City of Naples*, not the later decision in *Sutter*, controlled and concluded that the Federal Arbitration Act "places venue exclusively within the district court in and for the district within which the arbitration award was made." App. 3a-4a.

REASONS FOR GRANTING THE WRIT

As this Court has repeatedly recognized, arbitration plays a crucial role in the efficient administration of justice. This case presents a fundamental question concerning the procedure for enforcing arbitration awards: whether the Federal Arbitration Act requires applications to confirm, vacate or modify arbitration awards to be brought in the district in which the awards were made. The courts of appeals are hopelessly divided on this important and recurring issue, and, as the decision below demonstrates, this conflict is deepening.

I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF AT LEAST FIVE OTHER FEDERAL COURTS OF APPEALS

In the decision below, the Eleventh Circuit recognized a "significant split of authority in the U.S. [c]ourts of appeals as to whether the [Federal Arbitration Act's] venue provisions are permissive or mandatory" and suggested that the Court's guidance was needed to resolve this conflict. App. 3a n.3. Other courts have similarly noted that "the circuits currently are split on the question." *Apex Plumbing Supply, Inc. v. U.S. Supply Co.*, 142 F.3d 188, 192 (4th Cir.), *cert. denied*, 119 S. Ct. 178 (1998); see *also In re VMS Sec. Litig.*, 21 F.3d 139, 143 (7th Cir. 1994) (noting that "there is a sharp divergence of authority on this matter"). Commentators have recognized this conflict as well and called for this Court to resolve it. *See, e.g.*, 2 Thomas H. Oehmke, *Oehmke Commercial Arbitration* § 141:15 (rev. ed. 1998) (noting that "the federal circuits are divided as to whether a vacatur petition can only be filed where the award is made"); Note, *Mandatory Venue and Motions to Confirm or Vacate Under the Federal Arbitration Act*, 32 U.S.F.L.R. 629, 631 (1998) ("The United States Supreme Court should grant certiorari to the next eligible case and create a uniform rule for the circuits to follow.").[1]

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[1] *See also* Jay E. Grenig, *Alternative Dispute Resolution with Forms* § 20.2, at 357 (2d ed. 1998 Supp.) ("The circuits are divided as to whether these venue provisions in the Federal Arbitration Act are permissive and not mandatory."); Laurence J. Zielke, *Arbitrating Miller Act Claims and Problems in Enforcing An Award Under the Federal Arbitration Act*, 24 Pub. Cont. L.J. 401, 411 n.43 (1995) (noting that "the Circuits are divided" over whether Sections 9 and 10 provide permissive or mandatory venue); Note, *Venue for Motions to Confirm or Vacate Arbitration Awards Under the Federal Arbitration Act*, 57 Fordham L. Rev. 653, 654 (1989) ("A disagreement has developed among the courts as to the proper venue for motions brought pursuant to sections 9 and 10.").

The decision below conflicts with the decisions of at least five other courts of appeals. For example, in *In re VMS Securities Litigation*, 21 F.3d at 139, the Seventh Circuit considered whether a party to a securities class action in the Northern District of Illinois could move to vacate an arbitration award in that district on the ground that it was inconsistent with the class settlement. *See id.* at 141. When the other parties to the arbitration asserted that venue was improper because the arbitration took place outside the Northern District of Illinois, the court of appeals held that the venue was proper. *See id.* at 142-45. The Seventh Circuit reasoned that the language of Sections 9 and 10 does not explicitly restrict venue and that Congress "has usually employed more explicit language than" the permissive language in those sections when it intended to restrict venue to a particular court. *Id.* at 144. The court of appeals also found that treating Sections 9 and 10 as mandatory venue provisions would impose a "pointless and wasteful burden." *Id.* at 144-45. In particular, the Seventh Circuit observed that if Sections 9 and 10 were treated as mandatory, a court that already had jurisdiction over a controversy would "be prevented from proceeding with the matter to its conclusion," thereby compelling parties to "sue in another forum to vacate an award under § 10." *Id.* at 145.

The Fifth Circuit has also refused to find an exclusive venue for confirming and vacating arbitration awards. In *Sutter Corp. v. P & P Industries, Incorporated*, 125 F.3d 914 (5th Cir. 1997), the Western District of Oklahoma stayed proceedings before it pending arbitration. *See id.* at 916. After an arbitration in Dallas, the plaintiff moved to confirm the arbitration award in the Northern District of Texas, and the defendant moved to vacate in the Western District of Oklahoma. *See id.* When the Texas court refused to transfer the case back to Oklahoma where the case originated on the ground that Oklahoma was not a proper venue, the Fifth Circuit reversed. *See id.* at 919-20. Distinguishing its earlier

decision in *Prepakt Concrete*, the Fifth Circuit "agree[d] with the Seventh Circuit's reasoning in *In re VMS Securities Litigation*." *Id.* at 920. It therefore held that "[v]enue under § 9 is not mandatory" and that "venue under § 10 is . . . permissive." *Id.* at 919-20.

After the *Sutter* case was remanded and transferred to Oklahoma, the Tenth Circuit reached the same conclusion. In *P&P Industries, Inc. v. Sutter Corp.*, No. 98-6358, 1999 WL 339699, at *8 (10th Cir. May 28, 1999), the Tenth Circuit held that "the Western District of Oklahoma was authorized by § 9 to confirm the arbitration award, even though the award was handed down in Dallas, Texas." Considering the question *de novo*, the Tenth Circuit found that interpreting venue under the Federal Arbitration Act to be exclusive would "lead to wasteful allocation of judicial resources because district courts which otherwise have jurisdiction over arbitration cases would often be required to dismiss them." *Id.* at 7. The court of appeals also found that "Congress would have used stronger language than 'such application may be made' or 'may apply' if the intention was to restrict the power of a federal court in Arbitration Act cases." *Id.* (quotation omitted).

The Second and Fourth Circuits have likewise held that venue under the Federal Arbitration Act is permissive. *See Apex Plumbing*, 142 F.3d at 192 (holding that "section nine of the FAA confers permissive, rather than mandatory, venue upon district courts in and for the districts in which an arbitration award was made"); *Smiga v. Dean Witter Reynolds, Inc.*, 766 F.2d 698, 706 (2d Cir. 1985) (holding that "[o]nce a federal court has subject-matter jurisdiction over an action, it may confirm an arbitration award even though it was not the district where the award was granted").

The decision below cannot be reconciled with these rulings. In this case, as in *In re VMS Securities Litigation* and *Sutter*, the parties to an arbitration applied to confirm and vacate in

different courts: respondent applied to confirm the award in Alabama, in the judicial district where the arbitration took place, and petitioner applied to vacate that same award in Mississippi in the judicial district in which the underlying dispute occurred. App. 1a-2a. Relying upon the *Prepakt Concrete* decision rejected by the Fifth Circuit in *Sutter*, the decision below held that the Federal Arbitration Act's "venue provision places venue exclusively within the district court in and for the district within which the award was made." App. 3a. Moreover, in so doing, the court of appeals expressly refused to follow the "permissive" interpretation adopted by the Fifth Circuit in *Sutter*, which it noted that the Seventh Circuit in *VMS Securities Litigation* and the Second Circuit in *Smiga* had adopted. App. 3a & n.3. Thus, the conflict between the decision below and the decisions of the Second, Fourth, Fifth, Seventh and Tenth Circuits is clear.

As the decision below recognized, its interpretation of the Federal Arbitration Act is consistent with the Sixth Circuit's ruling in *Island Creek Coal Sales Co. v. City of Gainesville, Florida*, 729 F.2d 1046 (6th Cir. 1984). In that case, a party to an arbitration conducted in Kentucky sought to vacate the arbitrator's award in a Florida district court. *See* 729 F.2d at 1047-48. The other party to the arbitration applied to confirm the award in a Kentucky district court. *Id.* at 1049-50. When the Kentucky court refused to transfer the action, the Sixth Circuit affirmed on the ground that the arbitration award was made in Kentucky. *See id.* Relying on *Prepakt Concrete*, the Sixth Circuit concluded that section 9 gives the district court in the district where an arbitration award was made "exclusive jurisdiction to review the arbitrators' . . . order." *Id.* at 1050.

The Ninth Circuit has also held that the Federal Arbitration Act restricts where applications to vacate an arbitration award may be made. In *United States ex rel. Chicago Bridge & Iron Co. v. Ets-Hokin Corp.*, 397 F.2d 935 (9th Cir. 1968), a subcontractor filed suit against its prime contractor in the

United States District Court for the District of Arizona, which stayed proceedings pending arbitration. *See id.* at 936. After arbitration in San Francisco, the subcontractor moved to vacate the award in Arizona district court. *See id.* at 937. The Ninth Circuit held that the Arizona court had no jurisdiction under section 10 and should have deferred to confirmation proceedings brought by the prime contractor in California. *See id.* Although the Ninth Circuit now recognizes that Sections 9 and 10 are not jurisdictional, it continues to treat venue under the Federal Arbitration Act as exclusive. *See, e.g., Sunshine Beauty Supplies, Inc. v. United States District Court,* 872 F.2d 310, 312 (9th Cir. 1989) (holding that arbitration awards may only be reviewed in the district in which the awards were made).

In sum, eight circuits have considered whether venue under the Federal Arbitration Act is mandatory. These courts are now split, five in favor and three against. The conflict is long-standing: the courts of appeals have been in conflict since at least 1985. *Compare Smiga*, 766 F.2d at 706 (holding venue permissive) *with Ets-Hokin*, 397 F.2d at 939 (holding venue mandatory). Moreover, there is no sign that this conflict is working itself out. To the contrary, in the last three months the Tenth and Eleventh Circuits have issued squarely conflicting opinions. *Compare P&P Industries v. Sutter*, 1999 WL 339699, at *6-*7 (rejecting the interpretation adopted in the decision below) *with* App 3a n.3. Consequently, this Court's intervention is clearly warranted.

II. THE DECISION BELOW WAS WRONGLY DECIDED

More than thirty years ago in *Pure Oil Co. v. Suarez*, 384 U.S. 202 (1966), this Court considered the relationship between special venue statutes and the general venue statute. Noting that Congress amended the general revenue sate to expand the number of available venues, this Court held that

special venue statutes should be interpreted in light of the general venue statute's "liberalizing purpose . . . at least in the absence of contrary restrictive indications in any such statute." 384 U.S. at 204-05. Accordingly, special venue statutes have generally "been considered to be non-exclusive if the statute was originally intended to expand rather than contract venue." 17 Linda S. Mullenix & Georgene M. Vairo, *Moore's Federal Practice* § 110.01[3][b], at 110-16 (3d ed. 1999). The decision below ignores this basic principle and instead reads into the Federal Arbitration Act an inflexible rule that undermines the very purposes of the Act.

Nothing in the text of the Federal Arbitration Act suggests that Congress intended to prevent parties from seeking to confirm or vacate arbitration awards in districts in which "a substantial part of the events or omissions giving rise to [respondent's] claim occurred." 28 U.S.C. § 1391(a)(2). Where Congress has intended to restrict venue to particular districts, it has normally given clear and explicit instructions. *See, e.g.*, 28 U.S.C. § 1398 (providing that actions to enforce Interstate Commerce Commission orders "*shall* be brought *only* in a judicial district in which any of the parties bringing the action resides or has its principal office" (emphasis added)).[2] The Federal Arbitration Act does not contain any such

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[2] *See also* 42 U.S.C. § 7604(c)(1) (providing certain actions under the Clean Air Act "may be brought *only* in the judicial district in which such source is located) (emphasis added); 40 U.S.C. § 270b(b) (providing that actions under the Miller Act "*shall* be brought . . . in the United States District Court for any district in which the contract was to be performed and executed *and not elsewhere*") (emphasis added); 28 U.S.C. § 1403 (eminent domain actions by the United States "*shall* be brought in the district court of the district where the land is located") (emphasis added); *id.* § 1402(a) (FTCA claims "may be prosecuted *only*" in specified venues) (emphasis added); *id.* § 1399 (providing that partition actions involving the United States "may be brought *only* in the judicial district where such lands are located) (emphasis added).

instruction. To the contrary, section 10 states that the "United States court in and for the district wherein the award was made *may* make an order vacating the award upon the application of any party to the arbitration," 9 U.S.C. § 10 (emphasis added), and Section 9 provides that "[i]f no court is specified in the agreement of the parties, then such application *may* be made" in the same district. *Id.* § 9 (emphasis added). This language is, of course, permissive, not mandatory, in nature, *see, e.g.*, *Barlow v. Collins*, 397 U.S. 159, 166 (1970) (recognizing the word "may" to be a "permissive term"); *see also Apex Plumbing Supply*, 142 F.3d at 192 ("The word 'may' in a statute normally confers a discretionary power, not a mandatory power." (quotation omitted)), and therefore offers little reason to think that Congress intended venue under the Federal Arbitration Act to be exclusive.

Nor does either the legislative history or the structure of the Act suggest such an intent. The legislative history is silent on the subject of venue, *see* Note, *Venue for Motions to Confirm or Vacate Arbitration Awards Under the Federal Arbitration Act*, 57 Fordham L. Rev. 653, 658 (1989), and the structure of the Act conflicts with any suggestion that Congress intended to restrict venue in the federal courts to a single district. As this Court has observed, the Federal Arbitration Act leaves "enforcement of the Act . . . in large part to the state courts." *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 n. 32 (1983); *see also id.* (noting that the Act does not create federal subject matter jurisdiction). The Act does not dictate where actions to confirm or vacate an arbitration award in state court may be brought. If, however, the Act permits actions to confirm or vacate in state court to be brought where the events underlying the dispute occurred, there is little reason to believe that Congress intended to prohibit federal courts in those jurisdictions from hearing such claims.

Limiting the venue for reviewing arbitration awards would also undermine an important goal of the Federal Arbitration Act. One of the stated purposes of the Act is to provide a simple procedure that will "[reduce the] the technicality, delay, and expense to a minimum." H.R. Rep. No. 68-96, at 2. Permitting parties to bring actions to confirm or vacate in the district in which an arbitration award was made serves this goal because that district is normally a convenient venue. *See, e.g.*, *Motion Picture Laboratory v. McGregor & Werner*, 804 F.2d 16, 18 (2d Cir. 1986) (noting that "the parties have already indicated that the location is mutually convenient to settle their disputes") (quotation omitted). The district in which the arbitration award was made is not, however, always the most convenient forum. The location in which an arbitration is conducted may, for example, be determined by the convenience and preference of the arbitrator, not the parties.[3] As a consequence, restricting venue for actions to confirm or vacate arbitration awards to the districts in which those awards were made would in many cases prevent parties from litigating in the most convenient forum, thereby undermining the "statutory policy of rapid and unobstructed enforcement of arbitration agreements." *Moses H. Cone*, 460 U.S. at 23.

A rigid rule requiring all suits seeking to confirm, vacate or modify arbitration awards to be brought in the district where the award was made would also interfere with the efficient administration of justice in some instances. As the *VMS Securities Litigation* and *Sutter* cases demonstrate, *see supra* pp. 7-8, arbitrations frequently relate to pending actions conducted outside of the district in which the arbitration award

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[3] *See, e.g.*, *Sutter*, 125 F.3d at 916 (providing for arbitration "at the office of the [American Arbitration] Association nearest the principal place of business" of the parties); *Naples*, 490 F.2d at 184 (noting that the parties "agree[d] . . . to abide. . . . by the A.A.A.'s decision as to arbitration locale in cases of dispute").

is made. If the Federal Arbitration Act were interpreted to limit venue to the jurisdiction in which the award was made, the parties in those cases would be forced to file a new suit before a new judge who would have to familiarize himself or herself with the case, a "pointless and wasteful burden." *In re VMS Sec. Litig.*, 21 F.3d at 144-45.

As this Court has interpreted the Federal Arbitration Act to avoid "pointless and wasteful burden[s] on the supposedly summary and speedy procedures prescribed in the Arbitration Act," *Moses H. Cone*, 460 U.S. at 27; *see also Allied-Bruce Terminex Co. v. Dobson*, 513 U.S. 265, 280-81 (1995) (construing Section 2 of the FAA in light of the need for convenient and efficient resolution of issues relating to arbitration), the Act should not be interpreted to impose a mandatory and exclusive venue requirement. The venue provisions read into the Act should instead be interpreted to be permissive so that parties have the flexibility to bring actions to confirm or vacate arbitration awards outside the district in which that award was made in.

III. THE DECISION BELOW RAISES AN IMPORTANT AND RECURRING ISSUE

As the recent rash of court of appeals opinions addressing the issue demonstrates, *see supra* pp. 8-10 (discussing four opinions issued in the last two years), the question whether arbitration awards may be reviewed outside the district in which the award was made arises frequently. In recent years, as the number of cases brought in the federal courts has exploded, *see, e.g.*, Richard A. Posner, *The Federal Courts: Crisis and Reform* 63-64, 210 (1985), the number of disputes submitted to arbitration has risen sharply as well. *See, e.g.*, American Arbitration Association, *Statistical Report* at 1-2 (1998) (reporting 100,000 filings in 1998); *1997 NASD Annual Report*, <http://www.nasd.com/docs/97_annual.pdf> (visited June 2, 1999) (reporting 5,997 filings in 1997). Indeed, for

commercial disputes, arbitration may now be the primary method of dispute resolution. *See e.g.*, Steven A. Meyerowitz, *The Arbitration Alternative*, A.B.A. J., Feb. 1985, at 78, 79 (stating that "'more commercial claims [in the United States] are arbitrated than tried before a jury'"). It should come as no surprise then that the question of where an arbitration award may be enforced or challenged has come up dozens of times in the last decade.[4]

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[4] *See, e.g., P&P Indus., Inc. v. Sutter*, No. 98-6358, at *4-*8; *Apex Plumbing*, 142 F.3d at 192; *Baltin v. Alaron Trading Corp.*, 128 F.3d 1466, 1468 & n.4 (11th Cir. 1997), *cert. denied*, 119 S. Ct. 105 (1998); *Lander Co., v. MMP Investments, Inc.*, 107 F.3d 476, 480-81 (7th Cir.), *cert. denied*, 118 S. Ct. 55 (1997); *Sutter*, 125 F.3d at 918-20; *In re VMS Sec. Litig.*, 21 F.3d at 145; *Sunshine Beauty Supplies*, 872 F.2d at 311-12; *Island Creek Coal*, 729 F.2d at 1050; *Prozina Shipping Co. Ltd. v. Elizabeth-Newark Shipping Inc.*, No. 98 Civ. 5834(LMM), 1999 WL 203356, at *2-3 (S.D.N.Y. Apr. 12, 1999); *International Lithography Corp. v. Curro*, No. Civ. A. 96-7446, 1997 WL 633571, at *2 (E.D. Pa. Oct. 6, 1997); *Lindell v. Waddell & Reed, Inc.*, 962 F. Supp. 103, 105 n.3 (W.D. Mich. 1997); *Meadows Indemnity Co., Ltd. v. Arkwright Mutual Ins. Co.*, No. Misc. 88-0600, 1996 WL 557513, at *3 n.7 (E.D. Pa. Sept. 30, 1996); *Delta Dental of Rhode Island v. Dental Serv. of Mass.*, 918 F. Supp. 46, 48 (D.R.I. 1996); *In re Arbitration Between Lauritzen Kosan Tankers and Chemical Trading, Inc.*, 903 F. Supp. 635, 636-37 (S.D.N.Y. 1995); *Denver & Rio Grande W. R.R. v. Union Pac. R.R.*, 868 F. Supp. 1244, 1249-50 (D. Kan. 1994), *aff'd*, 119 F.3d 847 (10th Cir. 1997); *Dombrowski v. Swiftships, Inc.*, 864 F. Supp. 1242, 1252 (S.D. Fla. 1994); *United States ex rel. Skip Kirchdorfer, Inc. v. Aegis/Zublin Joint Venture*, 869 F. Supp. 387, 390-91 (E.D. Va. 1994); *Lopresti v. Electro-Films, Inc.*, Civ. A. No. 92-2965, 1992 WL 309634, at *6 (E.D. Pa. Oct. 20, 1992); *Tesoro Petroleum Corp. v. Asamera Ltd.*, 798 F. Supp. 400, 404-05 (W.D. Tex. 1992); *Alexander Ins. Ltd. v. Executive Life Ins. Co. of New York*, No. 90 Civ. 8268 (KMW), 1991 WL 150224, at *2 (S.D.N.Y. July 29, 1991); *Pennsylvania Data Entry, Inc. v. Nixdorf Computer Corp.*, 762 F. Supp. 96, 101 (E.D. Pa. 1990); *Soo Line R.R. v. Chicago & N. W. Transp. Co.*, 737 F. Supp. 68, 69 (D. Minn. 1990); *Elgart v. Sono-Tek Corp.*, Civ. A. No. 88-7539, 1989 WL 136280, at *3 (E.D. Pa. Nov. 9, 1989).

The conflict among circuits over this question creates a danger of duplicative proceedings and contradictory rulings. As the *Sutter* case demonstrates, in some circumstances, parties contending that arbitration awards may only be reviewed in the district in which the award get two bites at the apple. *See supra* pp. 8-9. Although the Fifth and Tenth Circuits agreed in the *Sutter* cases that venue under the Federal Arbitration Act is permissive rather than mandatory, *see id.*, in other cases there may be conflicting rulings. Indeed, in this case, if the Southern District of Mississippi had acted promptly on petitioner's motion to vacate, it would have been compelled by Fifth Circuit precedent to reach a conclusion directly opposite from the Eleventh Circuit's below and perhaps proceed along parallel tracks. *See Sutter*, 125 F.3d at 918-20. Thus, the need for a uniform national rule is clear.

The question presented in this case also affects the costs of challenging or enforcing an arbitration award, and because the relatively low cost of arbitration compared to litigation is one of arbitration's chief attractions, the question presented has important implications for the administration of justice and the federal court's ability to satisfy its work load. For this reason as well, the frequently-recurring question presented here warrants this Court's attention.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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June 7, 1999

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BILL HARBERT CONSTRUCTION COMPANY,
A DIVISION OF BILL HARBERT
INTERNATIONAL, INC.,
Plaintiff-Counter-Defendant, Appellee,

v.

CORTEZ BYRD CHIPS, INC., Defendant-
Counter-Claimant, Appellant.

No. 98-6404

March 9, 1999

Before TJOFLAT and EDMONDSON, Circuit Judges, and RONEY, Senior Circuit Judge.

PER CURIAM:

This case arises out of a dispute over an arbitration award that was confirmed by the district court for the Northern District of Alabama. The sole issue on appeal is whether venue was proper in that court. We affirm.

Plaintiff, Bill Harbert Construction Company, entered into an agreement to build a wood chip mill for defendant, Cortez Byrd Chips, Inc., in Brookhaven, Mississippi. The agreement provided for arbitration of "[a]ll claims or disputes between the contractor and the owner arising out of or relating to the contract, or the breach thereof. . . ." While the agreement expressly stated that Mississippi law was applicable, it did not provide for jurisdiction in a particular court, nor did it specify venue for confirmation or vacatur/modification of an award. It merely stated that "judgment may be entered upon [the

arbitration award] in accordance with applicable law in any court having jurisdiction thereof."

After a dispute arose between the two, Harbert Construction filed a demand for arbitration with the Atlanta, Georgia office of the American Arbitration Association. An arbitration panel conducted an arbitration proceeding in Birmingham, Alabama from Tuesday, November 18, 1997 through Friday, November 21, 1997. On December 20, 1997, the arbitrators rendered their award in favor of Harbert Construction.

Byrd filed a complaint to vacate and/or modify the arbitration award in the United States District Court for the Southern District of Mississippi on January 13, 1998. On January 20, 1998, Harbert filed this action in the Northern District of Alabama to confirm the arbitration award on January 20, 1998. Byrd filed an answer, counterclaim and motion to dismiss, transfer or stay this action. The district court denied Byrd's motion, holding that venue was properly in the Alabama district court, and entered final judgment in favor of Harbert for the net sum of $274,256.90 plus costs and interest.

On appeal, Byrd alleges the district court erred in denying his motion because according to a recent Fifth Circuit decision, venue is permissive and is proper in the district court in Mississippi because he filed his action there first. We review the venue question *de novo*.

The Federal Arbitration Act states that a motion to confirm an arbitration award[1] or to vacate an award[2] "may" be made to

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[1] If no court is specified in the arbitration agreement, an application for an order confirming the award "may be made to the United States court in and for the district within which such award was made." 9 U.S.C. § 9.

[2] Under certain circumstances, "the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration. . . ." 9 U.S.C. § 10.

the United States court in and for the district within which such award was made. 9 U.S.C. §§ 9, 10.

In determining the propriety of its venue, the district court relied on our decision in *Naples v. Prepakt Concrete Co.*, 490 F.2d 182, 184 (5th Cir.), *cert. denied*, 419 U.S. 843, 95 S. Ct. 76, 42 L Ed.2d 71 (1974). In *Naples*, this Court held that the Act's venue provision places venue exclusively within the district court in and for the district within which the arbitration award was made. Byrd asks us to follow instead the holding of a more recent Fifth Circuit decision, *Sutter Corp. v. P & P Indus., Inc.*, 125 F.3d 914 (5th Cir. 1997), in which that court held venue under §§ 9 and 10 to be permissive.[3] Although the *Sutter Corp.* opinion indicated that *Naples v. Prepakt Concrete Co.* did not decide this issue, it appears to us that it controls this panel's decision:

> [I]n view of § 9's command, and for reasons of judicial restraint and comity, the district judge [in Florida] should have declined to enjoin the confirmation proceedings in the Ohio district court [district within which the award was made]. *See Naples*, 490 F.2d at 184.

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[3] There is a significant split of authority in the U.S. Courts of appeal as to whether these venue provisions are permissive or mandatory. *See, e.g., In re VMS Securities Litigation*, 21 F.3d 139 (7th Cir. 1994) (§ 10 permissive); *Sunshine Beauty Supplies, Inc. v. United States District Court for Central Dist. of Cal.*, 872 F.2d 310 (9th Cir. 1989) (§ 9 mandatory); *Smiga v. Dean Witter Reynolds, Inc.*, 766 F.2d 698 (2d Cir. 1985)(§ 9 permissive), *cert. denied*, 475 U.S. 1067, 106 S. Ct. 1381, 89 L. Ed.2d 607 (1986); *Central Valley Typographical Union No. 46 v. McClatchy Newspapers*, 762 F.2d 741 (9th Cir. 1985) (§ 10 mandatory); *Island Creek Coal Sales Co. v. City of Gainesville, Florida*, 729 F.2d 1046 (6th Cir. 1984) (§ 9 mandatory). The Supreme Court has never resolved this conflict.

We are bound to follow this Court's prior precedent. Fifth Circuit decisions prior to October 1, 1981 are binding precedent on this Court, but not after that date 1981. *See Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981). Accordingly, the district court's decision is due to be affirmed.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BILL HARBERT CONSTRUCTION COMPANY, a division of Bill Harbert International, Inc.,	)	CIVIL ACTION NO. 98-G-0117-S
Plaintiff,	)	
v.	)	
CORTEZ BYRD CHIPS, INC.,	)	
Defendant.	)	

MEMORANDUM OPINION

The above-styled action to enforce the arbitration award was filed January 20, 1998. In its complaint Bill Harbert Construction Company [hereinafter Harbert] asked the court to enter an order confirming the arbitration panel's award and to enter judgment for the net sum of $274,256.90 ($1,845,000.00 — adjusted contract amount plus $2,500.00 reimbursement less $1,573,243.10 payment), plus interest, costs, and expenses. A copy of the award of the arbitrators was attached to the complaint.

Defendant's answer contained a counterclaim by which it asked the court to vacate the portion of the arbitration award pertaining to the payment of damages and all supporting analysis. At its April 17, 1998, motion docket the court heard the defendant's motion to dismiss, transfer or stay this action pending resolution by the District Court for the Southern

District of Mississippi. In its order and memorandum opinion of April 24, 1998, the court denied the motion, holding that the place of arbitration determines the jurisdiction of the court. "Consistent with the decision in *Prepakt*,[1] plus adoption of the reasoning of the Ninth Circuit in *Central Valley*,[2] this court holds that it has *exclusive* authority to adjudicate the action to vacate, modify, or correct the award."[3]

By order and memorandum opinion of May 20, 1998, the court held that since the arbitration properly took place in Alabama, following *Booth v. Hume Pub., Inc.*, 902 F.2d 925 (11th Cir. 1990), the motion to enforce the arbitration award was granted. By the same order and opinion the court denied defendant's motion to file an interlocutory appeal from its April 24, 1998, order.

By orders and memorandum opinions of April 24, 1998, and May 20, 1998, the court effectively disposed of defendant's counterclaim. A copy of those orders and opinions are attached hereto and are incorporated as part of this memorandum opinion.

Since there has been no specific ground of attack pleaded and no evidence proffered to support any attack on the award, the court holds that plaintiff is due final judgement as a matter of law, defendant's actions only seeking delay of the inevitable.

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[1] *City of Naples v. Prepakt Concrete Company*, 490 F.2d 182 (5th Cir. 1974), adopted as binding precedent in *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

[2] *Central Valley Typographical Union No. 46 v. McClathey Newspapers*, 762 F.2d 741 (9th Cir. 1985).

[3] Page 3 of the April 24, 1998, memorandum opinion.

An order consistent with this opinion is being entered contemporaneously herewith.

DONE and ORDERED this 1st day of June 1998.

/s/ J. Foy Guin, Jr.
UNITED STATES DISTRICT JUDGE
J. FOY GUIN, JR.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BILL HARBERT CONSTRUCTION COMPANY, a division of Bill Harbert International, Inc.,	)	CIVIL ACTION NO. 98-G-0117-S
Plaintiff,	)	
v.	)	
CORTEZ BYRD CHIPS, INC.,	)	
Defendant.	)	

MEMORANDUM OPINION

This motion came before the court at its April 17, 1998, motion docket. Both sides briefed and argued the motion well, and the court took the motion under advisement. Having considered the motion, pleadings, submissions and arguments of counsel, and the applicable law, the court is of the opinion the motion should be denied.

The issue before the court is whether the district court where an arbitration award was made has *exclusive* or *permissive* authority to adjudicate an action to vacate, modify, or correct the award pursuant to 9 U.S.C. § 9.

In 1974, the Fifth Circuit, in *City of Naples v. Prepakt Concrete Company*, 490 F.2d 182 (5th Cir. 1974)[1] held that by agreeing to "an arm's length commercial contract to abide by the A.A.A.'s decision as to arbitration locale . . . , the City had waived its right to oppose an Ohio locale." 490 F.2d at 184. The court held that arbitration had taken place in Ohio and therefore, "under § 9, the Ohio District Court was the proper court to confirm, vacate, modify, or correct the arbitration award." *Id.* Although the case dealt with the issue of waiver of the right to object to locale,[2] the court also held that the locale of the arbitration determined the authority of the court to decide issues pertaining to the arbitration award. The last holding controls the decision here.

Since defendant filed in the district court in Mississippi prior to plaintiff's filing the instant action here defendant has urged the court to follow the decision in *Sutter Corp. v. P&P Industries, Inc.*, 125 F.3d 914 (5th Cir. 1997), which held the "'first to file rule' not only determines which court may decide the merits of substantially similar cases, but also establishes which court may decide whether the second suit filed must be dismissed, stayed or transferred and consolidated." 125 F.3d at 920. This holding is inconsistent with the holding in *Prepakt* and with that of the Ninth Circuit in *Central Valley Typographical Union No. 46 v. McClathey Newspapers*, 762 F.2d 741, 744 (9th Cir. 1985) (placing primary reliance on where the arbitration was held).

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[1] The Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981, in *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

[2] In *Prepakt* the contract specified no specific place. The parties designated a method for choosing a place.

In the instant case, the underlying arbitration was conducted within the Northern District of Alabama. The arbitrators had the right to decide where to arbitrate and arbitrated in this district. Other than the holding in *Prepakt*, previously discussed, our circuit has not addressed the issue of whether the language of 9 U.S.C. § 9 conveys exclusive or permissive authority upon the district court in which the arbitration was heard. Even so, it is immaterial that the Eleventh Circuit has not decided whether permissive or mandatory jurisdiction applies: the old Fifth Circuit has. The PLACE of arbitration determines the jurisdiction of the court. By *Bonner* this court is bound to the situs of the arbitration.

Consistent with the decision in *Prepakt*, plus adoption of the reasoning of the Ninth Circuit in *Central Valley*, this court holds that it has *exclusive* authority to adjudicate the action to vacate, modify, or correct the award. Accordingly, the motion of the defendant to dismiss, transfer, or stay this action pending resolution by the United States District Court for the Southern District of Mississippi of Byrd's complaint to vacate and/or modify the arbitration award is denied.

An order consistent with this opinion is being entered contemporaneously herewith.

DONE and ORDERED this 24th day of April 1998.

/s/ J. Foy Guin, Jr.
UNITED STATES DISTRICT JUDGE
J. FOY GUIN, JR.

IN THE UNITED STATED DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BILL HARBERT CONSTRUCTION COMPANY, a division of Bill Harbert International, Inc.,	)	CIVIL ACTION NO. 98-G-0117-S
Plaintiff,	)	
v.	)	
CORTEZ BYRD CHIPS, INC.,	)	
Defendant.	)	

MEMORANDUM OPINION

The court has been asked to grant defendant's motion for an interlocutory appeal from its order of April 24, 1998, at which time the court ruled it had *exclusive* authority to adjudicate the action to vacate, modify, or correct the arbitration award. *City of Naples v. Prepakt Concrete Company*, 490 F.2d 182 (5th Cir. 1974);[1] *Central Valley Typographical Union No.46 v. McClathy Newspapers*, 762 F.2d 741, 744 (9th Cir. 1985). The court held that it was immaterial that the Eleventh Circuit has not decided whether permissive or mandatory jurisdiction applies since the old Fifth Circuit has. By *Bonner* this court is bound to the situs of the arbitration. There being no legitimate

[1] The Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981, in *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

difference of opinion between the old Fifth and Eleventh Circuits as to controlling law, the defendant's motion for interlocutory appeal is denied.

Since the arbitration properly took place here, this court has jurisdiction to consider vacating or affirming the arbitration award. As stated in *Booth v. Hume Pub., Inc.*, 902 F.2d 925, 932 (11th Cir. 1990), the Federal Arbitration Act expresses a presumption that arbitration awards will be confirmed by referring to the following words of the statute:

> Section 9 of the Act provides that if the parties have agreed to judicial confirmation of the award, then '*the court must grant such an order* [confirming the award] unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title.' 9 U.S.C. § 9 (1970) (emphasis added).

The arbitration award has not been vacated, modified, or corrected. The record being absent a valid ground for *vacatur* or modification,[2] and the motions having been fully briefed,[3] the arbitration award is due to be affirmed.

For the reasons set forth above the court holds the following:

1) the motion to grant an interlocutory appeal is denied;

2) the motion to vacate the arbitration award is denied; and

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[2] Defendant did not articulate a single legal ground pursuant to 9 U.S.C. § 10 by which the arbitration can be vacated (other than to plead, without evidentiary support, a "laundry list" of grounds in a purely conclusory manner).

[3] "[T]he district court need not conduct a full hearing on a motion to vacate or confirm; such motions may be decided on the papers without oral testimony." *Booth*, 902 F.2d at 932.

3) The motion to enforce the arbitration award is granted.

An order consistent with this opinion is being entered contemporaneously herewith.

DONE and ORDERED this 20th day of May 1998.

/s/ J. Foy Guin, Jr.
UNITED STATES DISTRICT JUDGE
J. FOY GUIN, JR.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BILL HARBERT CONSTRUCTION COMPANY, a division of Bill Harbert International, Inc.,	)	CIVIL ACTION NO. 98-G-0117-S
Plaintiff,	)	
v.	)	
CORTEZ BYRD CHIPS, INC.,	)	
Defendant.	)	

ORDER

This cause came before the court at its regularly scheduled motion docket of April 17, 1998, on the motion of defendant Cortez Byrd Chips, Inc. to dismiss, transfer, or stay this action pending resolution by the United States District Court for the Southern District of Mississippi of Byrd's complaint to vacate and/or modify the arbitration award. Having considered the motion, the pleadings, the submissions and arguments of counsel, and the applicable law, the court is of the opinion the motion should be denied. Accordingly, consistent with the memorandum opinion being entered contemporaneously herewith, it is

ORDERED, ADJUDGED and DECREED that the motion of defendant Cortez Byrd Chips, Inc. to dismiss, transfer, or stay this action pending resolution by the United States District Court for the Southern District of Mississippi of Byrd's

complaint to vacate and/or modify the arbitration award be and it hereby is DENIED.

DONE and ORDERED this 24th day of April 1998.

/s/ J. Foy Guin, Jr.
UNITED STATES DISTRICT JUDGE
J. FOY GUIN, JR.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BILL HARBERT CONSTRUCTION COMPANY, a division of Bill Harbert International, Inc.,	)	CIVIL ACTION NO. 98-G-0117-S
Plaintiff,	)	
v.	)	
CORTEZ BYRD CHIPS, INC.,	)	
Defendant.	)	

ORDER

This cause comes before the court on the following motions:

1) Motion of defendant Cortez Byrd Chips, Inc. to file an interlocutory appeal from this court's order dated April 24, 1998;

2) Motion of plaintiff Bill Harbert Construction Company to confirm the arbitration award;[1]

3) Plaintiff's renewed motion to confirm the arbitration award; and

[1] The motion is contained within the January 20, 1998, complaint. Although the motion is not properly filed as a motion, the renewed motion places it before the court.

4) Motion of defendant Cortez Byrd Chips, Inc. to vacate the arbitration award.[2]

Having considered the motions, the pleadings, and the arguments of counsel, the court is of the opinion that the motion to file the interlocutory appeal should be denied, the motion for *vacatur* should be denied, and the arbitration award should be enforced. Accordingly, consistent with the memorandum opinion being entered contemporaneously herewith, it is

ORDERED, ADJUDGED and DECREED that the motion of defendant Cortez Byrd Chips, Inc. to file an interlocutory appeal from this court's order dated April 24, 1998, be and it hereby is DENIED. It is

FURTHER ORDERED, ADJUDGED and DECREED that the motion of plaintiff Bill Harbert Construction Company to confirm the arbitration award be and it hereby is GRANTED. It is

FURTHER ORDERED, ADJUDGED and DECREED that the motion of defendant Cortez Byrd Chips, Inc. to vacate the arbitration award be and it hereby is DENIED.

DONE and ORDERED this 20th day of May 1998.

/s/ J. Foy Guin, Jr.
UNITED STATES DISTRICT JUDGE
J. FOY GUIN, JR.

[2] Although not properly filed as a motion, this motion appears in defendant's answer and counterclaim, and the court has taken it as a motion.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BILL HARBERT CONSTRUCTION COMPANY, a division of Bill Harbert International, Inc.,	)	CIVIL ACTION NO. 98-G-0117-S
Plaintiff,	)	
v.	)	
CORTEZ BYRD CHIPS, INC.,	)	
Defendant.	)	

FINAL JUDGMENT

Pursuant to the memorandum opinion being entered contemporaneously herewith, it is hereby ORDERED that FINAL JUDGMENT be entered in favor of plaintiff for the net sum of $274,256.90 ($1,845,000.00 — adjusted contract amount plus $2,500.00 reimbursement less $1,573,243.10 payment), plus interest in the amount of $2,542.70, plus costs in the amount of $150.00 for a total of $276,949.60.

DONE and ORDERED this 1st day of June 1998.

/s/ J. Foy Guin, Jr.
UNITED STATES DISTRICT JUDGE
J. FOY GUIN, JR.

RELEVANT STATUTES

TITLE 9. ARBITRATION
CHAPTER 1 — GENERAL PROVISIONS

§ 9. Award of arbitrators; confirmation; jurisdiction; procedure

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

§ 10. Same; vacation; grounds; rehearing

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration —

(1) Where the award was procured by corruption, fraud, or undue means.

(2) Where there was evident partiality or corruption in the arbitrators, or either of them.

(3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(5) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

(b) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.

§ 11. Same; modification or correction; grounds; order

In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration —

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

Supreme Court, U.S.
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No. 98-1960

In The

Supreme Court of the United States

CORTEZ BYRD CHIPS, INC.,

Petitioner,

v.

BILL HARBERT CONSTRUCTION COMPANY,
a division of Bill Harbert International, Inc.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the United States District Court for the district in which an arbitral award is made has jurisdiction to confirm the award despite the prior filing, in another district, of an action seeking to vacate the award.

PARTIES TO THE PROCEEDING

Respondent has no parent corporation and no non-wholly owned subsidiary.

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9 U.S.C. § 10 ..... *passim*

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Michael G. Schwartz & Amy Yip-Kikugawa, *Sunshine Beauty Supplies, Inc. v. United States District Court: Mandatory Venue and Motion to Confirm or Vacate Under the Federal Arbitration Act*, 32 U.S.F. L. Rev. 629 (1998) 7

STATEMENT OF THE CASE

Respondent, an Alabama corporation, is in the business of commercial construction. Respondent's principal place of business is in the State of Alabama. In 1995, Respondent entered into a contract with Petitioner, a Mississippi corporation, to erect a wood chip mill in Mississippi. The contract required arbitration of any disputes between the parties under the Construction Industry Arbitration Rules of the American Arbitration Association. The contract further provided that the arbitral award "shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof."

Having suffered excess expenditures, labor, and overhead as a result of actions by Petitioner and its designer and fabricator, Respondent filed a demand for arbitration on April 30, 1997, with the Atlanta, Georgia office of the American Arbitration Association (the "AAA"). The AAA determined that the proceeding should be conducted in Birmingham, Alabama. In November 1997, the arbitration panel conducted a four-day hearing in Birmingham, Alabama, during which testimony, other evidence, and arguments were presented by both parties.[1]

On December 10, 1997, the arbitration panel made an award in favor of Respondent and against Petitioner, under which Petitioner owes Respondent a net sum of

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[1] Contrary to the statement in Petitioner's petition, counsel for Respondent did not "admit[ ] [during these proceedings] that no written change order was ever executed." Pet. 4.

$274,256.90, together with post-award interest at the rate of 10% per annum.

On January 13, 1998, Petitioner filed an action in the United States District Court for the Southern District of Mississippi (Civil Action No. 3:98-CV-43-BN) seeking to vacate or modify the award. Rather than providing a basis for vacatur within the limitations of 9 U.S.C. § 10, Petitioner's complaint alleged only that the award was incorrect – that is, that the arbitrators' decision disregarded the "facts" and was contrary to the parties' agreement. The complaint characterized the arbitral award as "illogical," "irrational," "an exhibition of bad faith," "of a grievously flawed character," "arbitrary and capricious," and "constitut[ing] the arbitrators' own private brand of justice."

Unaware of the Mississippi district court filing, Respondent filed the present action in the United States District Court for the Northern District of Alabama on January 20, 1998, to confirm the arbitral award. Petitioner responded with a counterclaim seeking vacatur of the award on the same grounds set forth in its complaint in the Mississippi district court. Petitioner also filed a motion to dismiss, transfer, or stay the Alabama district court action based on the pendency of the action in the Mississippi district court. The court denied this motion, holding it had exclusive jurisdiction over any action to confirm or vacate the award.

On May 21, 1998, the Alabama district court confirmed the arbitral award, entering final judgment in favor of Respondent for the net sum of $274,256.90. The district court noted that Petitioner "did not articulate a

single legal ground pursuant to 9 U.S.C. § 10 by which the arbitration can be vacated (other than to plead, without evidentiary support, a "laundry list" of grounds in a purely conclusory manner)." Pet. App. 12a.

At the time the Alabama district court entered judgment confirming the arbitral award, the Mississippi district court had neither entered any order confirming, modifying, or vacating the award, nor conducted any hearing for that purpose. Thereafter, on June 23, 1998, the Mississippi district court entered an order staying further proceedings pending issuance of a mandate by the Eleventh Circuit, and no further action has been taken in that case.

On appeal to the United States Court of Appeals for the Eleventh Circuit, Petitioner did not challenge the Alabama district court's finding that it had failed to articulate a cognizable basis for vacatur of the arbitral award. Rather, Petitioner argued only that venue was proper in both the Alabama and Mississippi districts and that, therefore, the "first-to-file" rule prohibited the Alabama district court from proceeding. The Eleventh Circuit Court of Appeals, by a three-judge panel, affirmed on the basis that the *panel* was bound by the pre-split Fifth Circuit decision in *City of Naples v. Prepakt Concrete Co.*, 490 F.2d 182, 184 (5th Cir.), *cert. denied*, 419 U.S. 843 (1974) (*"Naples"*), under which the Northern District of Alabama was the exclusive forum for adjudication of the action. Pet. App. 1a. Petitioner did not seek rehearing *en banc*.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

I. THERE IS NO COMPELLING REASON TO GRANT THE WRIT

Respondent acknowledges that the circuit courts of appeals are split on the issue of whether the district in which an arbitral award is made is the exclusive venue for actions under Sections 9 and 10 of the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 9, 10. Contrary to Petitioner's argument, however, there is no compelling need for this Court to resolve the conflict. A review of the decisions of the circuit courts suggests that, given the opportunity to do so, they may resolve the conflict without this Court's intervention.

City of Naples v. Prepakt Concrete Co., 490 F.2d 182 (5th Cir. 1974), which the Eleventh Circuit panel below found to be controlling, was the seminal decision on this issue. In *Naples*, a panel of the former Fifth Circuit held that Section 9 of the FAA places venue exclusively within the district in which the arbitration award was made.

> [I]n view of § 9's command, and for reasons of judicial restraint and comity, the District Judge [in Florida] should have declined to enjoin the confirmation proceeding in the Ohio District Court. The arbitration hearing had lawfully taken place in Ohio. . . . Diversity of citizenship existed. . . . Therefore, under § 9, the Ohio District Court was the proper court to confirm, vacate, modify, or correct the arbitration award.

Id. at 184 (citations omitted).

In 1984, the Sixth Circuit reached the same conclusion in *Island Creek Coal Sales Co. v. City of Gainesville*, 729 F.2d 1046, 1050 (6th Cir. 1984). The following year, in *Central Valley Typographical Union No. 46 v. McClatchy Newspapers*, 762 F.2d 741 (9th Cir. 1985), the Ninth Circuit aligned with the Fifth and Sixth Circuits in holding that venue under 9 U.S.C. § 10 was exclusive.

Indeed, prior to 1989, the only circuit court that had reached a decision contrary to *Naples* was the Second Circuit. *Motion Picture Lab. Technicians Local 780 v. McGregor & Werner, Inc.*, 804 F.2d 16, 18-19 (2d Cir. 1986); *Smiga v. Dean Witter Reynolds, Inc.*, 766 F.2d 698, 706 (2d Cir. 1985), *cert. denied*, 475 U.S. 1067 (1986). In 1989, however, the trend toward finding these venue provisions to be exclusive dramatically reversed.

In 1989, both the Fifth and Ninth Circuits faced this issue for the second time. In *Sunshine Beauty Supplies, Inc. v. United States Dist. Ct.*, 872 F.2d 310, 312 (9th Cir. 1989), a panel of the Ninth Circuit found itself bound by court precedent and held that the venue provision in Section 10 was mandatory. The Fifth Circuit, however, moved in the other direction. In *Purdy v. Monex Int'l, Ltd.*, 867 F.2d 1521 (5th Cir.), *cert. denied*, 493 U.S. 863 (1989), the court held, without citing its contrary decision in *Naples*, that Section 9 "does not establish an exclusive forum for suits upon arbitral awards." *Id.* at 1523.

Since 1989, all circuit courts addressing the issue, with the exception of the decision below, have found the venue provisions of 9 U.S.C. §§ 9 and 10 to be permissive. *In re VMS Sec. Litig.*, 21 F.3d 139, 145 (7th Cir. 1994), considered to be a leading decision holding venue to be

permissive under these sections, was decided in 1994. In *Sutter Corp. v. P&P Indus., Inc.*, 125 F.3d 914, 919 (5th Cir. 1997), the Fifth Circuit reaffirmed its holding in *Purdy* that venue under 9 U.S.C. § 9 is permissive, this time expressly recognizing and rejecting its earlier decision in *Naples*. In 1998, the Fourth Circuit in *Apex Plumbing Supply, Inc. v. U.S. Supply Co.*, 142 F.3d 188, 191-92 (4th Cir. 1998), *cert. denied*, 119 S. Ct. 178 (1998), found *VMS* persuasive and held venue under Section 9 to be permissive, rather than mandatory. Most recently, the Tenth Circuit has joined the majority of circuits in *P&P Indus., Inc. v. Sutter Corp.*, No. 98-6358, 1999 WL 339699 (10th Cir. May 28, 1999), in finding venue under Sections 9 and 10 to be permissive.

The present case was the Eleventh Circuit's first opportunity to address this issue. Under the law of the Eleventh Circuit, however, a three-judge panel is powerless to reverse circuit precedent. *Combs v. Plantation Patterns*, 106 F.3d 1519, 1532 (11th Cir. 1997), *cert. denied*, 118 S. Ct. 685 (1998). Moreover, the Eleventh Circuit has adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*). Consequently, while the Fifth Circuit had already rejected its decision in *Naples*, the Eleventh Circuit's three-judge panel found that it was powerless to do so, and that *Naples* controlled the decision in this case.

Although it noted the circuit split on the venue issue, the Eleventh Circuit panel decision did not, as Petitioner states, "suggest[ ] that [this] Court's guidance was needed to resolve this conflict." Pet. 6. Rather, because the Eleventh Circuit *en banc* could have revisited *Naples*,

the opinion below should be read simply as inviting an application for rehearing *en banc*. Nevertheless, for reasons not apparent from the record, Petitioner elected not to seek rehearing *en banc*, thus depriving the Eleventh Circuit of the opportunity to give independent consideration to the issue.

Petitioner quotes a student note[2] as stating, "The United States Supreme Court should grant certiorari to the next eligible case and create a uniform rule for the circuits to follow." Pet. 6. In fact, the quoted sentence advocates review by this Court only "if the Ninth Circuit is unwilling to reverse its own precedent." *Id.* The Ninth Circuit has had no opportunity to reconsider its position in the ten years since its panel decision in *Sunshine Beauty Supplies*, and that decision was dictated by the court's 1985 *Central Valley* holding. Similarly, the Sixth Circuit has not had occasion to reconsider this issue since its 1984 decision in *Island Creek*.

If the Eleventh Circuit had upheld *Naples* in an *en banc* decision or denied rehearing *en banc*, or if the Sixth or Ninth Circuit had done the same with respect to their aging precedent, it might be argued that resolution of the circuit split would require this Court's intervention. As matters now stand, however, it appears that, rightly or wrongly, the circuits may be moving toward consensus on this issue. Because the issue does not affect fundamental rights, but only venue of actions, there is no urgent

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[2] Michael G. Schwartz & Amy Yip-Kikugawa, *Sunshine Beauty Supplies, Inc. v. United States District Court: Mandatory Venue and Motions to Confirm or Vacate Under the Federal Arbitration Act*, 32 U.S.F. L. Rev. 629 (1998).

need for this Court to take action and thus no compelling reason why the Petition for Writ of Certiorari should be granted.

II. THE DETERMINATIVE ISSUE IN THIS CASE IS ONE OF DISCRETION – THAT IS, WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION IN REFUSING TO APPLY THE "FIRST-TO-FILE RULE"

Regardless of whether venue is permissive or mandatory under Sections 9 and 10 of the FAA, the Northern District of Alabama was a proper forum for proceedings to confirm, modify, or vacate the arbitral award in this case. The issue raised by Petitioner thus is not one of jurisdiction or venue, but of comity – that is, whether the Alabama district court was required to defer to the Mississippi district court under the "first-to-file rule."

The "first-to-file rule" is discretionary. The Fifth Circuit has described the rule as follows:

> The federal courts long have recognized that the principle of comity requires federal district courts – courts of coordinate jurisdiction and equal rank – to exercise care to avoid interference with each other's affairs. . . . The concern manifestly is to avoid the waste of duplication, to avoid rulings which may trench upon the authority of sister courts, and to avoid piecemeal resolution of issues that call for a uniform result. . . . To avoid these ills, a district court *may* dismiss an action where the issues presented can be resolved in an earlier-filed action pending in another district court.

West Gulf Maritime Ass'n v. ILA Deep Sea Local 24, 751 F.2d 721, 728-29 (5th Cir. 1985) (emphasis added) (citations omitted).

Other circuit courts have similarly held that the "first-to-file rule" is not mandatory, but is reviewed for abuse of discretion. *Alltrade, Inc. v. Uniweld Prods., Inc.*, 946 F.2d 622, 625 (9th Cir. 1991); *First City Nat'l Bank & Trust Co. v. Simmons*, 878 F.2d 76, 80 (2nd Cir. 1989). The "first-to-file rule" is merely a "general principle" of law, *see Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976), or a "rule of thumb," *see Smith v. SEC*, 129 F.3d 356, 361 (6th Cir. 1997). As the Court held in *Smith v. SEC*:

> When a federal court is presented with such a duplicative suit, it may exercise its discretion to stay the suit before it, to allow both suits to proceed, or, in some circumstances, to enjoin the parties from proceeding in the other suit.

Id. (citing *Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180, 183-84 (1952)).

In this case, the two district court complaints were filed only a week apart. Respondent was unaware of the Mississippi action at the time it filed suit in Alabama. Because the Mississippi district court had not engaged in any substantive proceedings before the Alabama district court's entry of final judgment, there was no "interference" with the affairs of the Mississippi district court. In view of the AAA's determination that the Northern District of Alabama was the most appropriate venue for the arbitration proceedings, the plain lack of merit in the

Petitioner's challenge to the arbitral award, and the controlling precedent of *Naples*, the Alabama district court did not abuse its discretion in declining to defer to the Mississippi district court. Moreover, while Petitioner argues that the Eleventh Circuit's decision must be overruled to reduce the "technicality, delay, and expense" of arbitration proceedings, Pet. 13, none of these goals would be served by requiring the enforceability of the arbitral award to be relitigated in the Mississippi district court.

Regardless of whether the Alabama district court was the exclusive, or one of many permissible venues under 9 U.S.C. §§ 9 and 10, the court had discretion to enter judgment, rather than deferring to the Mississippi district court. Because the issue addressed in the Petition for Writ of Certiorari does not affect the outcome of this case, this case does not provide an appropriate vehicle for this Court's consideration of the issue, and the Petition should be denied.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

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No. 98-1960

IN THE

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CORTEZ BYRD CHIPS, INC.,

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v.

BILL HARBERT CONSTRUCTION COMPANY,
A DIVISION OF BILL HARBERT INTERNATIONAL, INC.,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

REPLY FOR THE PETITIONER

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REPLY FOR PETITIONER

As the petition demonstrated, this case presents an important and recurring question over which the lower courts are sharply divided. In an opposition filed at the Court's request, respondent does not seriously dispute this demonstration. Not surprisingly, the opposition also fails to advance any persuasive reason for denying certiorari in this case.

1. The petition showed that this case warrants review for three reasons:

(i) there is a widespread and well-recognized conflict among the federal courts of appeals over the proper venue for applications to confirm, vacate or modify arbitration awards (Pet. at 6-10);

(ii) the decision below, which requires such applications to be brought in the district in which the arbitration award was made, conflicts with the text of the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, its structure and purpose, and the efficient administration of justice (*id.* at 10-14); and

(iii) this issue arises frequently and the conflict among the circuits over it creates a danger of duplicative proceedings and conflicting rulings (*id.* at 14-16).

Respondent concedes — as it must — that "the circuits courts of appeals are split" over the question presented by this petition, Opp. at 4, and notably absent from the opposition is any attempt to defend the decision below or dispute that this case presents a recurring issue important to the administration of justice.

2. Respondent's primary argument is that this Court need not resolve the conflict among the circuits because the courts of appeals "may be moving toward consensus" and may therefore resolve the conflict without this Court's intervention. Opp. at 7. This is a desperate argument. As respondent acknowledges, with the important exception of the decision

below, the most recent court of appeals decisions have held the venue provisions of the Federal Arbitration Act to be permissive. *Id.* at 5-6. Thus, respondent's argument is only that the decision below contradicts the conclusion towards which the courts may be progressing.

In addition, respondent fails to offer any evidence supporting its claim that the conflict among the circuits will disappear without this Court's intervention. As respondent concedes (Opp. at 4-5), the conflict as an old one, dating back to at least 1985. *Compare Smiga v. Dean Witter Reynolds, Inc.*, 766 F.2d 698, 706 (2d Cir. 1985) (venue provisions permissive) *with City of Naples v. Prepakt Concrete Co.*, 490 F.2d 182, 184 (5th Cir. 1974) (mandatory). Moreover, respondent cannot point to a single case or commentator suggesting that this long-standing conflict will vanish once parties start filing petitions for rehearing *en banc*. Finally, contrary to respondent's suggestion, the court below did not "invit[e] an application for rehearing *en banc*" (Opp. at 7) by noting that "[t]he Supreme Court has never resolved this conflict." Pet. App. 3a n.3. As petitioner pointed out (Pet. At 6), the Eleventh Circuit was instead inviting this Court to grant certiorari and resolve the conflict among the circuits.

3. Contrary to respondent's representation (Opp. at 7), the Ninth Circuit has had more than ample opportunity to reconsider its interpretation of the Federal Arbitration Act's venue provisions. Since 1968, the Ninth Circuit has issued at least five decisions finding that applications to affirm, vacate or modify an arbitration award must be brought in the district in which the arbitration award was made — including one this year. *See Sir Speedy v. Garber*, No. 97-5562, 1999 WL 10060 at *2 (9th Cir. Jan. 15, 1999) ("[U]nder the Federal Arbitration Act (FAA), venue over petitions to vacate awards is limited to

the district where the award was made.").[1] Moreover, the Ninth Circuit has never suggested that it would change its interpretation if only a petition for rehearing *en banc* were filed.

4. Respondent's claim that the panel below was "powerless" to depart from the Fifth Circuit's decision in the *Prepakt* case (Opp. at 6) is equally without merit. In *Prepakt*, after an action to confirm an arbitration was filed in the district in which the arbitration award was made, the opposing party moved in another district to enjoin the confirmation proceedings. *See* 490 F.2d at 183. When the second district refused to issue an injunction, the Fifth Circuit affirmed. *See* 490 F.2d at 184. As the petition pointed out (Pet. at 7-8), in the Fifth Circuit's view, this decision "does not directly answer the question whether venue under § 9 is mandatory." *Sutter Corp v. P & P Indus., Inc.*, 125 F.3d 914, 1919 (5th Cir. 1997). Had the panel below not found *Prepakt*'s reasoning persuasive, it could have taken the same position. Thus, contrary to respondent's claim, the conflict among the circuits remains vital and is deepening.

5. Although respondent asserts that this case is not an appropriate vehicle for resolving the conflict among the circuits, Opp. at 10, it does not dispute that this case squarely presents the question over which the circuits are split. Instead, respondent contends that "the Alabama district court did not abuse its discretion in declining to defer to the Mississippi

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[1] *See also Feliciano v. Wirth*, No. 88-1565, 1990 WL 119607 at *2 (9th Cir. Aug. 13, 1990); *Sunshine Beauty Supplies, Inc. v. United States District Court*, 872 F.2d 310, 312 (9th Cir. 1989); *Central Valley Typographical Union v. McClatchy Newspapers*, 762 F.2d 741, 744 (9th Cir. 1985); *United States ex rel. Chicago Bridge & Iron Co. v. Ets-Hokin Corp.*, 397 F.2d 935, 938-39 (9th Cir. 1968).

district court." *Id.*[2] In fact, however, the district court never exercised its discretion under the first-filed rule because, as respondent elsewhere acknowledges (*id.* at 2), the court found that it had "*exclusive* authority to adjudicate the action to vacate, modify, or correct the award" in this case. Pet. App. 10a.

Moreover, had the district court refused to transfer this case, it would have abused its discretion. In the Eleventh Circuit, as elsewhere, courts follow the rule that "[i]n absence of compelling circumstances, the court initially seized of a controversy should be the one to decide the case." *Merrill Lynch, Pierce, Fenner & Smith v. Haydu*, 675 F.2d 1169, 1174 (11th Cir. 1982); *see generally* 17 *Moore's Federal Practice* § 111.13[1][o][ii] (3d ed. 1999). As respondent has never suggested any such compelling circumstances here, the district court would clearly have been required under the first-filed rule to transfer this action to the Southern District of Mississippi, where petitioner's request to vacate the arbitration award in this case was first filed. Opp. at 2.

6. Finally, respondent urges this Court to deny certiorari because the question presented "does not affect fundamental rights" and "does not affect the outcome of this case" Opp. at

[2] Respondent also asserts in its recitation of the facts that there is no basis for vacating the arbitration award in this case. Opp. at 2-3. Petitioner, however, alleged that the contract at issue here required a written change order for any upward adjustments, and that the arbitrators disregarded this requirement in awarding respondent an upward adjustment despite the admitted lack of any such order. Answer at 5. Although respondent disputes making such an admission, Opp. at 1 n.1, it cannot dispute that the admission was alleged or that an arbitration award disregarding the terms of the contract is subject to vacatur. *See, e.g., Coast Trading Co. v. Pacific Molasses Co.*, 681 F.2d 1195, 1198 (9th Cir. 1982); *see generally United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960) (noting that an arbitrator's award may be upheld "only so long as it draws its essence" from the contract at issue).

7, 10. This argument sweeps too broadly. Although questions of venue and procedure rarely affect either fundamental rights or the outcome of a case, this Court routinely reviews such questions. *See, e.g., Stewart Org. Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988); *Leroy v. Great Western United Corp.*, 443 U.S. 173 (1979); *Denver & Rio Grande Western R.R. Co. v. Brotherhood of R.R. Trainmen*, 387 U.S. 556 (1967); *Van Dusen v. Barrack*, 376 U.S. 612 (1964); *Norwood v. Kirkpatrick*, 349 U.S. 29 (1955). Thus, the nature of the question presented offers no justification for ignoring the long-standing conflict over it and the problems this conflict creates for the administration of justice.

CONCLUSION

For the foregoing reasons, and those stated in the petition, the petition for writ of certiorari should be granted.

Respectfully submitted,

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August 23, 1999

Supreme Court, U.S.
FILED
OCT 25 1999
CLERK

(6)

No. 98-1960

IN THE

Supreme Court of the United States

CORTEZ BYRD CHIPS, INC.,

Petitioner,

v.

BILL HARBERT CONSTRUCTION COMPANY,
A DIVISION OF BILL HARBERT INTERNATIONAL, INC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

JOINT APPENDIX

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Petition for Certiorari Filed June 7, 1999
Certiorari Granted September 10, 1999

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1.	1/20/98	Complaint to enforce arbitration award
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3.	1/21/98	Summons and complaint issued
4.	2/27/98	Answer to complaint and counterclaim by defendant against plaintiff filed
5.	2/27/98	Motion by defendant to dismiss or to transfer or to stay case
6.	2/27/98	Motion by defendant to vacate the portion of the arbitration award pertaining to the payment of damages filed
7.	3/2/98	Motion by plaintiff for leave to amend its complaint by making a substitution to paragraph 5
8.	3/2/98	Order granting motion for leave to amend complaint entered
9.	4/22/98	Answer to counterclaim filed
10.	4/24/98	Memorandum opinion filed
11.	4/24/98	Order denying motion to dismiss, to transfer or to stay case filed
12.	5/11/98	Motion by defendant for order to file interlocutory appeal filed
13.	5/18/98	Motion (renewed) by plaintiff for order to confirm arbitration award filed

14. 5/20/98 Memorandum opinion filed

15. 5/20/98 Order denying motion for order to file interlocutory appeal, granting motions for order to confirm arbitration award, denying motion to vacate the portion of the arbitration award pertaining to the payment of damages filed

16. 5/29/98 Notice of appeal by defendant filed

17. 6/1/98 Memorandum opinion filed

18. 6/1/98 Order that Final Judgment be entered in favor of plaintiff for net sum of $274,256.90 plus interest of $2,542.70 plus costs of $150.00 for a total of $276,949.60, Terminating case

19. 6/4/98 Notice (amended) of appeal by defendant

20. 6/12/98 Motion (Emergency) by defendant to stay, and for addition time to post supersedeas bond filed

21. 6/17/98 Order denying motion to stay, and for additional time to post supersedeas bond entered

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2. 9/21/98 Appellant Brief

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[Filed Jan. 20, 1998]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BILL HARBERT CONSTRUCTION COMPANY, a division of Bill Harbert International, Inc.,	)
Plaintiff,	)
	) **Civ. Action**
v.	) **No. [98CV117]**
CORTEZ BYRD CHIPS, INC.,	)
Defendant.	)

COMPLAINT TO ENFORCE ARBITRATION AWARD

Parties

1. Plaintiff, Bill Harbert Construction Company ("Harbert"), an unincorporated division of Bill Harbert International, Inc., an Alabama corporation, is in the business of commercial construction. Harbert's principal place of business is in Birmingham, Alabama.

2. Defendant, Cortez Byrd Chips, Inc. ("Cortez Byrd"), a Mississippi corporation, is in the business of debarking and chipping logs for the paper products industry. Cortez Byrd's principal place of business is in Brookhaven, Mississippi.

Jurisdiction

3. Jurisdiction exists in this Court by virtue of diversity of citizenship, 28 U.S.C. § 1332. The amount in controversy exceeds Seventy Five Thousand Dollars ($75,000.00), exclusive of interest and costs.

4. As demonstrated below, jurisdiction also exists in this Court by virtue of the Federal Arbitration Act, 9 U.S.C. § 9.

Facts and Procedural Background

5. On October 16, 1995, a predecessor in interest to Harbert entered into a contract with Cortez Byrd to erect a prefabricated chip mill in Brookhaven, Mississippi.

6. Article 10.8 of the contract provides:

> All claims or disputes between the Contractor and the Owner arising out [of] or relating to the Contract, or the breach thereof, shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association currently in effect. . . . Notice of the demand for arbitration shall be filed in writing with the other party to this Agreement and with the American Arbitration Association and shall be made within a reasonable time after the dispute has arisen. The award rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.

7. After Harbert completed the project in or about October 1996, it engaged in a series of discussions with Cortez Byrd, regarding excess expenditures, labor, and overhead incurred by Harbert as a result of actions by Cortez Byrd and Cortez Byrd's designer and fabricator.

8. Harbert was unable to resolve its dispute with Cortez Byrd and, on April 30, 1997, filed a demand for arbitration in writing with Cortez Byrd and the Atlanta, Georgia office of the American Arbitration Association.

9. An arbitration panel was thereafter selected, who on Tuesday, November 18, 1997, through Friday, November 21, 1997, conducted an arbitration proceeding in Birmingham,

Alabama. Sworn testimony and evidence were presented to the arbitration panel by both parties.

10. On December 10, 1997, the arbitration panel made an award in favor of Harbert and against Cortez Byrd, adjusting the base contract amount owed Harbert upward from $1,357,000.00 to $1,845,000.00. The arbitrators also ordered Cortez Byrd to pay Harbert $2,500.00 as reimbursement to Harbert of Cortez Byrd's share of the arbitrators' fees and expenses that were previously advanced to the American Arbitration Association by Harbert. A true and correct copy of the arbitration panel's award is attached hereto as Exhibit A.

11. Pursuant to the award, Cortez Byrd is required to pay the sums owed Harbert within 60 days of the award date. Thereafter, interest is to accrue at the rate of ten percent per annum.

12. Prior to the arbitration, Cortez Byrd had paid to Harbert $1,573,243.10.

WHEREFORE, Harbert requests the Court to enter an order confirming the arbitration panel's award and to enter judgment thereon in favor of Harbert and against Cortez Byrd for the net sum of $274,256.90 ($1,845,000.00 adjusted contract amount plus $2,500.00 reimbursement less $1,573,243.10 payment), plus interest, costs, expenses, and other and further relief the Court deems just and proper.

/s/ Edward P. Meyerson
EDWARD P. MEYERSON
114309504

/s/ Frederick M. Thurman
FREDERICK M. THURMAN
256963110
Attorneys for Plaintiff

Exhibit A

AMERICAN ARBITRATION ASSOCIATION
ARBITRATION TRIBUNAL

In the Matter of the Arbitration Between:

Bill Harbert Construction Company, a division of Bill Harbert International, Inc. ("Harbert")
and
Cortez Byrd Chips, Inc. ("Byrd")

CASE NUMBER: 30 110 00164 97

AWARD OF ARBITRATORS
December 19, 1999

(Exhibit A printed in full at pages 62 to 63 of this Joint Appendix)

[Filed Feb. 27, 1998]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BILL HARBERT CONSTRUCTION COMPANY, a division of Bill Harbert International, Inc.,	)	
Plaintiff,	)	
	)	**Action No.**
v.	)	**98G117S**
	)	
CORTEZ BYRD CHIPS, INC.,	)	
Defendant.	)	

ANSWERS, DEFENSES AND COUNTERCLAIM

COMES NOW the Defendant, Cortez Byrd Chips, Inc. ("Byrd"), and files this its Answer, Defenses and Counterclaim as follows:

FIRST AFFIRMATIVE DEFENSE

The Complaint fails to state a claim upon which relief may be granted.

SECOND AFFIRMATIVE DEFENSE

This Court does not have proper jurisdiction or venue over this matter.

1. Defendant is currently without information sufficient to admit or deny the averments contained in paragraph 1 of the Complaint.

2. Admitted.

JURISDICTION

3. Denied. Jurisdiction in this action is proper in the United States District Court for the Southern District of Mississippi, Jackson Division.

4. Denied. 9 U.S.C. § 9 is permissive and not mandatory, and jurisdiction and venue are proper in the United States District Court for the Southern District of Mississippi, Jackson Division, where a Complaint to Vacate and/or Modify Arbitration Award was pending at the time this action was filed.

FACTS AND PROCEDURAL BACKGROUND

5. Admitted.

6. Admitted.

7. Defendant denies that Harbert ever "completed the project." It is admitted that the parties discussed certain excess expenditures, labor, and overhead Harbert alleged to have incurred in constructing the chip mill facility at issue. Any and all remaining allegations of paragraph 7 are denied.

8. It is admitted Harbert filed a demand for arbitration of the dispute. Any and all remaining allegations of paragraph one are denied.

9. Admitted.

10. Defendant denies that the arbitration panel made an award in favor of Harbert on December 10, 1997. Rather, the award was not rendered and forwarded to the parties until on or about December 20, 1997. It is admitted the arbitration panel entered an award adjusting the base contract amount owed Harbert upward from $1,357,000.00 to $1,845,500.00. The remaining allegations of paragraph 10 are admitted.

11. Admitted.

12. Admitted.

13. Defendant specifically denies any and all allegations contained in the paragraph beginning with the words "WHEREFORE, Harbert requests . . . ." Byrd specifically denies any liability for any damages whatsoever in this matter and denies the validity of the arbitration panel's award.

And now, the Defendant having fully answered the allegations in the Complaint, and without waiving any denials of the allegations of the Complaint or defenses thereto, asserts counterclaim as follows:

COUNTERCLAIM

1. Cortez Byrd Chips, Inc., is a duly licensed Mississippi corporation doing business in the State of Mississippi with its principal office located in the State of Mississippi, P.O. Box 547, Brookhaven, Mississippi 39601. Byrd is the owner of a chip mill facility located in Brookhaven, Mississippi, the construction and erection of which was the subject of the underlying arbitration proceeding at issue in this action.

2. Harbert is a division of Bill Harbert International, Inc., a corporation duly licensed and doing business in the State of Alabama with its principal offices located in the State of Alabama. Harbert contracted with Byrd to erect and build Byrd's chip mill facility located in Brookhaven, Mississippi, and is the party that instituted the underlying arbitration which is the subject of this Complaint. Harbert, at the time of bidding on this project and entering into the Agreement with Byrd, although not disclosed to or known by Byrd at that time, was not a duly licensed contractor in the State of Mississippi and did not hold a valid Certificate of Responsibility in Mississippi or similar certificate issued by another state recognizing such certificate issued by the State of Mississippi pursuant to the mandate found *Miss.Code Ann.* § 31-3-21 (Supp. 1997). Thus Harbert was precluded from invoking the null and void arbitration clause of the Agreement.

FACTS

3. The parties entered into an Abbreviated Form of Agreement Between Owner and Contractor (the "Agreement" or "Contract") with the effective date commencing October 16, 1995, a copy of which Agreement is attached hereto as Exhibit "A" and incorporated herein by reference. Paragraph 10.8 of the Agreement provided for arbitration of "[a]ll claims or disputes between the contractor and the owner arising out or relating to the contract, or the breach thereof . . . ."

4. A dispute arose between Harbert and Byrd relating to Harbert's construction of Byrd's chip mill facility located in Brookhaven, Mississippi. On April 30, 1997, Harbert made a demand for arbitration requesting a hearing and an award of damages from Byrd for certain construction costs and overages allegedly incurred during the erection of the chip mill facility. Byrd denied any obligation to pay any amount whatsoever over and above the original contract price of $1,357,000.00.

5. Pursuant to the arbitration clause contained in paragraph 10.8 of the Agreement, the following arbitrators were chosen by the parties to conduct the arbitration herein:

a. James R. Seale, Esquire
Robinson & Belzer
200 Coosa Street
Montgomery, Alabama 36102

b. Mr. David C. Dando
51 Wheelless Street
Suite 200
Memphis, Tennessee 38117

c. Mr. Charles Scallorn
100 Congress Avenue
Suite 1800
Austin, Texas 78701

On November 18-21, 1997, the arbitrators conducted a hearing and witnesses were called and evidence was presented by the parties.

6. Byrd claimed before the arbitration panel, and still claims, that Harbert proceeded at its own peril when it allegedly incurred certain costs which plainly required a written change order to be executed and approved by the parties in accordance with the Agreement. There was not one single change order written and executed by the parties in this case in accordance with the Agreement. This fact was admitted by counsel for Harbert at the commencement of the arbitration proceeding on November 18, 1997. No evidence of a change order as contemplated by the Agreement was placed in evidence for the arbitrators' consideration.

7. On December 20, 1997, the arbitrators rendered their award in writing and transmitted it to the parties via facsimile, a copy of which is attached hereto as Exhibit "B" and incorporated herein by reference.

8. The award of the arbitrators is based upon "Change Order Number One" resulting in an "adjusted contract amount of $1,845,500.00," with all amounts previously paid by Byrd to be offset against that amount. Thus, the arbitrators concluded that Byrd was obligated to pay the sum of $488,500.00, less all amounts previously paid by Byrd, which amount is the arbitrators' total calculation of Change Order Number One, and is the difference between the original contract sum agreed to by the parties, $1,357,000.00 and the "adjusted contract amount," $1,845,500.00. Although he was not obligated to do so under the terms of the Agreement, Byrd paid Harbert an amount exceeding $200,000.00 over the contract price. This amount is offset against the $488,500.00 adjustment.

9. The arbitrators required the balance due to be paid to Harbert, less any previous payments made by Byrd, within sixty (60) days from the award transmittal date, or from December

20, 1997. Any and all other claims made by Harbert in the demand for arbitration or presented to the panel of arbitrators were denied.

10. The arbitrators based their award on issues not placed before them by the parties, and thereby exceeded their authority and failed to conform to the specific contractual limitations placed upon their authority by the Agreement.

11. In issuing their award, the arbitrators made irrational findings and refused to apply facts as they found them to the issues characterized by the parties.

12. Despite absolutely no evidence of a written change order processed and executed in accordance with the terms of the Agreement, the arbitrators found that "Change Order Number One" required an adjustment of the contract sum in the amount of $488,500.00, to be offset by payments previously made by Byrd.

13. In providing the stated relief, the arbitrators' ultimate conclusions and the resulting award are illogical, contrary to express findings pertaining to the parties' intent, an exhibition of bad faith, impermissible modification of the Agreement, in manifest disregard of established facts and controlling law, and constitutes the arbitrators' own private brand of justice.

14. The arbitrators' award clearly does not draw its essence from the contract between the parties; but rather, the arbitrators in rendering the award at issue disregarded and/or modified plain and unambiguous provisions of the Agreement. The award rendered by the arbitration panel is of grievously flawed character and should be vacated by this Court. The record before the arbitration panel demonstrates unambiguous and undisputed mistake of fact and demonstrates strong reliance on that mistake of fact by the arbitration panel in making their award.

15. For all reasons stated herein, as well as for other good and valid reasons, the arbitrators' decision in the case with regard to their alleged remedy and their interpretation of the Agreement should be vacated and/or modified.

WHEREFORE, Plaintiff moves this Court for an Order vacating the portion of the arbitration award pertaining to the payment of damages and all supporting analysis on the grounds that the award is (1) in violation of the Agreement, (2) in excess of the arbitrators' authority, (3) irrational, (4) the result of bad faith, (5) arbitrary and capricious, (6) fails to draw its essence from the terms of the Agreement, and (7) is in manifest disregard of the established facts and law.

Respectfully submitted,

CORTEZ BYRD CHIPS, INC.

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John F. Hawkins, MS Bar No. 9556
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210 East Capitol Street
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BY: /s/ John F. Hawkins
JOHN F. HAWKINS

Exhibit A

THE AMERICAN INSTITUTE OF ARCHITECTS

[Seal]

AIA Document A107

ABBREVIATED FORM OF AGREEMENT BETWEEN OWNER AND CONTRACTOR
For CONSTRUCTION PROJECTS OF LIMITED SCOPE where the Basis of Payment is a STIPULATED SUM

1987 EDITION

(Exhibit A printed in full at pages 41 to 61 of this Joint Appendix)

Exhibit B

AMERICAN ARBITRATION ASSOCIATION
ARBITRATION TRIBUNAL

In the Matter of the Arbitration Between:

Bill Harbert Construction Company, a division of Bill Harbert International, Inc. ("Harbert")
and
Cortez Byrd Chips, Inc. ("Byrd")

CASE NUMBER: 30 110 00164 97

AWARD OF ARBITRATORS
December 19, 1999

(Exhibit B printed in full at pages 62 to 63 of this Joint Appendix)

[Filed Feb. 27, 1998]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BILL HARBERT CONSTRUCTION COMPANY,
a division of Bill Harbert
International, Inc.

PLAINTIFF

V.

CORTEZ BYRD CHIPS, INC. **DEFENDANT**

ACTION NO. 98G117S

MOTION TO DISMISS, TRANSFER OR STAY

COMES NOW the Defendant, Cortez Byrd Chips, Inc. ("Byrd"), and submits this its Motion to Dismiss, Transfer or Stay this Action Pending Resolution by the District Court for the Southern District of Mississippi of Byrd's Complaint to Vacate and/or Modify Arbitration Award, and in support thereof, states as follows:

1. On January 13, 1998, Byrd filed a Complaint in the District Court for the Southern District of Mississippi, Jackson Division, to Vacate and/or Modify an Arbitration Award against Bill Harbert Construction Company, a division of Bill Harbert International, Inc. ("Harbert"). Thereafter, on January 20, 1998, Harbert filed in this Court its Complaint to Enforce Arbitration Award. Those two actions are attached hereto as Exhibits "A" and "B" respectively and incorporated herein by reference.

2. Byrd is entitled to have this action dismissed, transferred or stayed based on the "first to file rule". *Sutter Corp. v. P & P Industries, Inc.*, 125 F.3d 914 (5th Cir. 1997). Where, as here, the Mississippi and Alabama actions "overlap

on the substantive issues, the cases [should] be . . . consolidated in . . . the jurisdiction first seized of the issues." *Id.* at 917, quoting *Mann Mfg., Inc. v. Cortex, Inc.*, 439 F.2d 403, 408 n.6 (5th Cir. 1971). Mississippi is the "jurisdiction first seized of the issues," as Byrd filed its Complaint in the District Court for the Southern District of Mississippi, Jackson Division, prior to Harbert filing its Complaint on overlapping, identical substantive issues in the District Court for the Northern District of Alabama, Southern Division.

3. Jurisdiction and venue are proper in the District Court for the Southern District of Mississippi to determine the issues raised in Byrd's Complaint to Vacate and/or Modify the Arbitration Award pursuant to 9 U. S. C. §§ 10 and 11. The venue provisions of 9 U.S.C. §§ 10 and 11 are permissive. 9 U.S.C § 10 provides that "the United States Court in and for the district wherein the award was made may make an Order vacating the award upon the application of any party to the arbitration. . . ." In the *Sutter Corp.* case, the court recognized as follows:

> However, if venue under § 10 is mandatory, then the Texas district court would be the exclusive forum to decide P & P's motion to vacate the arbitration award, which would make a dismissal, transfer or stay impossible. Those circuits which have dealt with the question, uniformly agree that §§ 9 and 10 must be construed the same, regardless of whether they are found to be permissive or mandatory. *In re VMS Securities Litigation*, 21 F.3d at 142, *citing Sunshine Beauty Supplies, Inc. v. United States District Court for Central Dist. of Cal.*, 872 F.2d 310, 312 n.4 (9th Cir. 1989), *and Motion Picture Lab. Technicians Local 780 v. McGregor & Werner, Inc.*, 804 F.2d 16, 19 (2d Cir. 1986). In any event, a mandatory reading of § 10 would create the same absurd result decried in *Purdy*. We agree with the Seventh Circuit's reasoning in *In re VMS Securities Litigation*, 21 F.3d at 142-45, and hold that venue under § 10 is also permissive.

> Thus, § 10 did not prevent the Texas district court from dismissing, staying or transferring P & P's motion to vacate under the "first to file rule".

4. The venue provisions of 9 U.S.C. §§ 9, 10 and 11 are permissive, and not mandatory. Thus, the "first to file rule" determines which court may decide the merits of substantially similar cases, as well as the issue of which court may decide whether the second suit filed (Harbert's Alabama Complaint) must be dismissed, stayed or transferred and consolidated. *Sutter Corp.* at 920.

5. Byrd filed its Complaint in the Southern District of Mississippi, Jackson Division prior to Harbert filing its Complaint in the District Court for the Northern District of Alabama. Further, the issues raised in Byrd's suit to vacate and/or modify the arbitration award and the issues raised in Harbert's Alabama lawsuit seeking confirmation of the arbitration award are identical. Therefore, based on the "first to file rule," the District Court for the Southern District of Mississippi, Jackson Division, is the proper court to exercise its discretion determining whether the Harbert action filed in Alabama should be dismissed, transferred or stayed pending resolution of Byrd's Complaint and Motion to Vacate and/or Modify lodged in the District Court for the Southern District of Mississippi.

WHEREFORE, Defendant Cortez Byrd Chips, Inc. respectfully submits this case should be dismissed, transferred or stayed pending disposition by the District Court for the Southern District of Mississippi resolving whether the Alabama action should be allowed to proceed independently or should be dismissed, transferred, stayed and/or consolidated with the Mississippi action.

Respectfully submitted,

CORTEZ BYRD CHIPS, INC.
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John F. Hawkins, MS Bar No. 9556
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Post Office Box 3977
Jackson, Mississippi 39207-3977
(601) 355-8855

By: /s/ John F. Hawkins
JOHN F. HAWKINS

Exhibit A
[Filed Jan. 13, 1998]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

CORTEZ BYRD CHIPS, INC.,	)	
Plaintiff,	)	
	)	**Civ. Action**
v.	)	**No. 3198CV43BN**
	)	
BILL HARBERT CONSTRUCTION	)	
COMPANY, a division of Bill Harbert	)	
International, Inc.,	)	
Defendant.	)	

COMPLAINT

COMES NOW, Cortez Byrd Chips, Inc. ("Byrd") and files this his Complaint against Bill Harbert Construction Company, a division of Bill Harbert International, Inc. ("Harbert") by and through undersigned counsel, to vacate and/or modify an arbitration award rendered by a panel of arbitrators of the American Arbitration Association ("AAA") in favor of Herbert, and in support thereof states as follows:

PARTIES

1. Cortez Byrd Chips, Inc., is a duly licensed Mississippi corporation doing business in the State of Mississippi with its principal office located in the State of Mississippi, P.O. Box 547, Brookhaven, Mississippi, 39601. Byrd is the owner of a chip mill facility located in Brookhaven, Mississippi, the construction and erection of which was the subject of the underlying arbitration proceeding at issue in this Complaint.

2. Harbert is a corporation duly licensed and doing business in the State of Alabama with its principal offices located in the State of Alabama. Harbert contracted with Byrd to erect and build Byrd's chip mill facility located in Brookhaven, Mississippi, and is the party that instituted the underlying arbitration which is the subject of this Complaint. Harbert, at the time of bidding on this project and entering into the Agreement with Byrd, although not disclosed to or known by Byrd at that time, was not a duly licensed contractor in the State of Mississippi and did not hold a valid Certificate of Responsibility in Mississippi or similar certificate issued by another state recognizing such certificate issued by the State of Mississippi pursuant to the mandate found in *Miss. Code Ann.* § 31-3-21 (Supp. 1997). Thus Harbert was precluded from invoking the null and void arbitration clause of the Agreement.

JURISDICTION AND VENUE

3. Jurisdiction and venue are proper in this Court under 9 U.S.C. §§ 10 and 11. Additionally, jurisdiction is proper in this Court based on diversity of citizenship of the parties with the amount in controversy exceeding $75,000.00. The contract between these parties provided that the job was to be performed in Brookhaven, Mississippi, and all work by defendant on this job was performed at that site. The contract also provided that Mississippi law would apply and that according to the applicable arbitration rules any arbitration hearing would be held at the location of the job.

FACTS

4. The parties entered into an Abbreviated Form of Agreement Between Owner and Contractor (the "Agreement" or "Contract") with the effective date commencing October 16, 1995, a copy of which Agreement is attached hereto as Exhibit "A" and incorporated herein by reference. Paragraph 10.8 of the Agreement provided for arbitration of "[a]ll claims or

disputes between the contractor and the owner arising out or relating to the contract, or the breach thereof . . . ."

5. A dispute arose between Harbert and Byrd relating to Harbert's construction of Byrd's chip mill facility located in Brookhaven, Mississippi. On April 30, 1997, Harbert made a demand for arbitration requesting a hearing and an award of damages from Byrd for certain construction costs and overages allegedly incurred during the erection of the chip mill facility. Byrd denied any obligation to pay any amount whatsoever over and above the original contract price of $1,357,000.00.

6. Pursuant to the arbitration clause contained in paragraph 10.8 of the Agreement, the following arbitrators were chosen by the parties to conduct the arbitration herein:

a. James R. Seale, Esquire
Robinson & Belzer
200 Coosa Street
Montgomery, Alabama 36102

b. Mr. David C. Dando
51 Wheelless Street
Suite 200
Memphis, Tennessee 38117

c. Mr. Charles Scallorn
100 Congress Avenue
Suite 1800
Austin, Texas 78701

On November 18-21, 1997, the arbitrators conducted a hearing and witnesses were called and evidence was presented by the parties.

7. Byrd claimed before the arbitration panel, and still claims, that Harbert proceeded at its own peril when it allegedly incurred certain costs which plainly required a written

change order to be executed and approved by the parties in accordance with the Agreement. There was not one single change order written and executed by the parties in this case in accordance with the Agreement. This fact was admitted by counsel for Harbert at the commencement of the arbitration proceeding on November 18, 1997. No evidence of a change order as contemplated by the Agreement was placed in evidence for the arbitrators' consideration.

8. On December 20, 1997, the arbitrators rendered their award in writing and transmitted it to the parties via facsimile, a copy of which is attached hereto as Exhibit "B" incorporated herein by reference.

9. The award of the arbitrators is based upon "Change Order Number One" resulting in an "adjusted contract amount of $1,845,500.00," with all amounts previously paid by Byrd to be offset against that amount. Thus, the arbitrators concluded that Byrd was obligated to pay the sum of $488,500.00, less all amounts previously paid by Byrd, which amount is the arbitrators' total calculation of Change Order Number One, and is the difference between the original contract sum agreed to by the parties, $1,357,000.00 and the "adjusted contract amount," $1,845,500.00. Although he was not obligated to do so under terms of the Agreement, Byrd paid Harbert an amount exceeding $200,000.00 over the contract price. This amount is offset against the $488,500.00 adjustment.

10. The arbitrators required the balance due to be paid to Harbert, less any previous payments made by Byrd, within sixty (60) days from the award transmittal date, or from December 20, 1997. Any and all other claims made by Harbert in the demand for arbitration or presented to the panel of arbitrators were denied.

11. The arbitrators based their award on issues not placed before them by the parties, and thereby exceeded their authority

and failed to conform to the specific contractual limitations placed upon their authority by the Agreement.

12. In issuing their award, the arbitrators made irrational findings and refused to facts as they found them to the issues characterized by the parties.

13. Despite absolutely no evidence of a written change order processed and executed in accordance with the terms of the Agreement, the arbitrators found that "Change Order Number One" required an adjustment of the contract sum in the amount of $488,500.00, to be offset by payments previously made by Byrd.

14. In providing the stated relief, the arbitrators' ultimate conclusions and the resulting award are illogical, contrary to express findings pertaining to the parties' intent, an exhibition of bad faith, impermissible modification of the Agreement, in manifest disregard established facts and controlling law, and constitutes the arbitrators' own private brand of justice.

15. The arbitrators' award clearly does not draw its essence from the contract between the parties; but rather, the arbitrators in rendering the award at issue disregarded or modified plain and unambiguous provisions of the Agreement. The award rendered by the arbitration panel is of grievously flawed character and should be vacated by this Court. The record before the arbitration panel demonstrates unambiguous and undisputed mistake of fact and demonstrates strong reliance on that mistake of fact by the arbitration panel in making their award.

16. For all reasons stated herein, as well as for other good and valid reasons, the arbitrators' decision in the case with regard to their alleged remedy and their interpretation of the Agreement should be vacated and/or modified.

WHEREFORE, Plaintiff moves this Court for an Order vacating the portion of the arbitration award pertaining to the

payment of damages and all supporting analysis on the grounds that the award is (1) in violation of the Agreement, (2) in excess of the arbitrators' authority, (3) irrational, (4) the result of bad faith, (5) arbitrary and capricious, (6) fails to draw its essence from the terms of the Agreement, and (7) is in manifest disregard of the established facts and law.

Respectfully submitted,

CORTEZ BYRD CHIPS, INC.

John L. Maxey, II, MS Bar No. 1946
John F. Hawkins, MS Bar No. 9556
MAXEY, WANN & BEGLEY, PLLC
Suite 1900, Deposit Guaranty Plaza
210 East Capital Street
Post Office Box 3977
Jackson, Mississippi 39207-3977
(601) 355-8855

By: /s/ John L. Maxey
JOHN L. MAXEY

By: /s/ John F. Hawkins
JOHN F. HAWKINS

Exhibit B
[Filed Jan. 20, 1998]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BILL HARBERT CONSTRUCTION COMPANY, a division of Bill Harbert International, Inc.,	)	
Plaintiff,	)	
	)	**Civ. Action**
v.	)	**No. [98CV117]**
	)	
CORTEZ BYRD CHIPS, INC.,	)	
Defendant.	)	

COMPLAINT TO ENFORCE ARBITRATION AWARD

(Exhibit B printed in full at pages 4 to 6 of this Joint Appendix)

[Filed March 2, 1998]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BILL HARBERT CONSTRUCTION COMPANY, a division of Bill Harbert International, Inc.,	)	
Plaintiff,	)	
	)	**Civ. Action**
v.	)	**No. 98-G-0117-S**
	)	
CORTEZ BYRD CHIPS, INC.,	)	
Defendant.	)	

MOTION FOR LEAVE TO AMEND

Pursuant to Federal Rule of Civil Procedure 15(a), Plaintiff Bill Harbert Construction Co., a division of Bill Harbert International, Inc., moves the Court for leave to amend its complaint by substituting the following paragraph for paragraph 5 of the complaint:

> 5. On October 16, 1995, Harbert entered into a contract with Cortez Byrd to erect a prefabricated chip mill in Brookhaven, Mississippi.

As grounds for this motion, Plaintiff states as follows:

1. Justice requires that Plaintiff be allowed to amend its Complaint.

2. No discovery has been initiated or taken prior to the service of this motion.

3. No party will be prejudicated by the amendment.

/s/ Edward P. Meyerson
EDWARD P. MEYERSON, 114309504

/s/ Frederick M. Thurman
FREDERICK M. THURMAN, 256963110

[Entered March 2, 1998]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BILL HARBERT CONSTRUCTION COMPANY, a division of Bill Harbert International, Inc.,	)	
Plaintiff,	)	
	)	**Civ. Action**
v.	)	**No. 98-G-0117-S**
	)	
CORTEZ BYRD CHIPS, INC.,	)	
Defendant.	)	

[Handwritten Order at end of Motion for Leave to Amend (printed in full at pages 28 to 29 of this Joint Appendix): Granted 3/2/98 /s/ J. Foy Guin, Jr., Judge]

[Filed April 22, 1998]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BILL HARBERT CONSTRUCTION COMPANY, a division of Bill Harbert International, Inc.,	)	
Plaintiff,	)	
	)	**Civ. Action**
v.	)	**No. 98-G-0117-S**
	)	
CORTEZ BYRD CHIPS, INC.,	)	
Defendant.	)	

ANSWER TO COUNTERCLAIM

First Defense

Defendant's claim for *vacatur* or modification fails to state a claim upon which relief can be granted.

Second Defense

With respect to the specific numbered allegations of the Counterclaim, Plaintiff admits, denies, and otherwise responds as follows:

1. Plaintiff admits the allegations contained in paragraph 1 of the Counterclaim.

2. Plaintiff admits the allegations contained in the first and second sentences of paragraph 2 of the Counterclaim, and denies all of the remaining allegations contained therein.

3. Plaintiff admits the allegations contained in paragraph 3 of the Counterclaim.

4. Plaintiff admits the allegations contained in paragraph 4 of the Counterclaim.

5. Plaintiff admits the allegations contained in paragraph 5 of the Counterclaim.

6. Plaintiff denies the allegations contained in paragraph 6 of the Counterclaim.

7. Plaintiff admits the allegations contained in paragraph 7 of the Counterclaim.

8. Plaintiff denies that Defendant was not obligated under the terms of the Agreement to pay sums in excess of the contract price, and admits all of the other allegations contained in paragraph 8 of the Counterclaim.

9. Plaintiff admits the allegations contained in paragraph 9 of the Counterclaim.

10. Plaintiff denies the allegations contained in paragraph 10 of the Counterclaim.

11. Plaintiff denies the allegations contained in paragraph 11 of the Counterclaim.

12. Plaintiff admits that the arbitrators found that "Change Order Number One" required an adjustment of the contract sum in the amount of $488,500.00, to be offset by payments previously made by Defendant, and denies all of the other allegations contained in paragraph 12 of the Counterclaim.

13. Plaintiff denies the allegations contained in paragraph 13 of the Counterclaim.

14. Plaintiff denies the allegations contained in paragraph 14 of the Counterclaim.

15. Plaintiff admits the allegations contained in paragraph 15 of the Counterclaim.

Plaintiff denies that Defendant is entitled to any relief whatsoever and reasserts its position that the arbitration award is due to be confirmed.

/s/ Edward P. Meyerson
EDWARD P. MEYERSON, 114309504

/s/ Frederick M. Thurman
FREDERICK M. THURMAN, 256963110

Attorneys for Plaintiff

OF COUNSEL:

BERKOWITZ, LEFKOVITS,
ISOM & KUSHNER
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SouthTrust Tower, Suite 1600
420 North 20th Street
Birmingham, Alabama 35203-5202
(205) 328-0480

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BILL HARBERT CONSTRUCTION COMPANY, a division of Bill Harbert International, Inc.,	)
Plaintiff,	)
	) Civ. Action
v.	) No. 98-G-0117-S
	)
CORTEZ BYRD CHIPS, INC.,	)
Defendant.	)

April 24, 1998

MEMORANDUM OPINION

(Found in the Appendix to the Petition
for Certiorari at 8a-10a)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BILL HARBERT CONSTRUCTION COMPANY, a division of Bill Harbert International, Inc.,	)
Plaintiff,	)
	) Civ. Action
v.	) No. 98-G-0117-S
	)
CORTEZ BYRD CHIPS, INC.,	)
Defendant.	)

April 24, 1998

ORDER

(Found in the Appendix to the Petition
for Certiorari at 14a-15a)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BILL HARBERT CONSTRUCTION COMPANY, a division of Bill Harbert International, Inc.,	)	
Plaintiff,	)	
	)	Civ. Action
v.	)	No. 98-G-0117-S
	)	
CORTEZ BYRD CHIPS, INC.,	)	
Defendant.	)	

May 20, 1998

MEMORANDUM OPINION

(Found in the Appendix to the Petition
for Certiorari at 11a-13a)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BILL HARBERT CONSTRUCTION COMPANY, a division of Bill Harbert International, Inc.,	)	
Plaintiff,	)	
	)	Civ. Action
v.	)	No. 98-G-0117-S
	)	
CORTEZ BYRD CHIPS, INC.,	)	
Defendant.	)	

May 20, 1998

ORDER

(Found in the Appendix to the Petition
for Certiorari at 16a-17a)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BILL HARBERT CONSTRUCTION COMPANY, a division of Bill Harbert International, Inc.,	)	
Plaintiff,	)	
	)	Civ. Action
v.	)	No. 98-G-0117-S
	)	
CORTEZ BYRD CHIPS, INC.,	)	
Defendant.	)	

June 1, 1998

MEMORANDUM OPINION

(Found in the Appendix to the Petition
for Certiorari at 5a-7a)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BILL HARBERT CONSTRUCTION COMPANY, a division of Bill Harbert International, Inc.,	)	
Plaintiff,	)	
	)	Civ. Action
v.	)	No. 98-G-0117-S
	)	
CORTEZ BYRD CHIPS, INC.,	)	
Defendant.	)	

June 1, 1998

FINAL JUDGMENT

(Found in the Appendix to the Petition
for Certiorari at 18a)

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BILL HARBERT CONSTRUCTION COMPANY,
A DIVISION OF BILL HARBERT
INTERNATIONAL, INC.,
Plaintiff-Counter-Defendant, Appellee,

v.

CORTEZ BYRD CHIPS, INC., Defendant-
Counter-Claimant, Appellant.

No. 98-6404

Decided March 9, 1999

(Found in the Appendix to the Petition
for Certiorari at 1a-4a)

[Executed Oct. 16, 1995]
THE AMERICAN INSTITUTE OF ARCHITECTS

[Seal]

AIA Document A107

ABBREVIATED FORM OF AGREEMENT
BETWEEN OWNER AND CONTRACTOR
For CONSTRUCTION PROJECTS OF LIMITED
SCOPE where the Basis of Payment is a STIPULATED SUM

1987 EDITION

THIS DOCUMENT HAS IMPORTANT LEGAL
CONSEQUENCES; CONSULTATION WITH AN
ATTORNEY IS ENCOURAGED WITH RESPECT
TO ITS COMPLETION OR MODIFICATION

This document includes abbreviated General Conditions
and should not be used with other general conditions.
It has been approved and endorsed by The Associated
General Contractors of America

AGREEMENT

made as of the day of in the year of Nineteen Hundred and

BETWEEN the Owner:
(Name and address)
Cortez Byrd Chips, Inc.
P.O. Box 547
Brookhaven, Mississippi 39601

and the Contractor:
(Name and address)
Bill Harbert Construction, Inc.
1329 Forestdale Boulevard
Birmingham, Alabama 35214
The Project is:
(Name and location)
Cortez Byrd Wood Chipper
(Quality Machine &Fab Works Job #002)

The [illegible] *Designer* is:
(Name and address)
Quality Machine & Fab Works
Trussville, Alabama.

The Owner and Contractor agree as set forth below.

ARTICLE 1
THE WORK OF THIS CONTRACT

1.1 The Contractor shall execute the entire Work described in the Contract Documents, except to the extent specifically indicated in the Contract documents to be the responsibility of others, or as follows:

Provide labor and materials (concrete and rebar included) to install concrete foundation on prepared site as shown on drawings prepared by Quality Machine. (Site Grading will be by others)

Provide labor and construction equipment to erect structural steel and install process equipment as shown on drawings prepared by Quality Machine.

Provide labor and materials to electrically connect all motors and controls. Main power will be installed within 50' of chipper, by others.

ARTICLE 2
DATE OF COMMENCEMENT AND SUBSTANTIAL COMPLETION

2.1 The date of commencement is the date from which the Contract time of Paragraph 2.2. is measured, and shall be the date of this Agreement, as first written above, unless a different date is stated below or provision is made for the date to be fixed in a notice to proceed issued by the Owner. . . .

October 16, 1995

2.2 The Contractor shall achieve Substantial Completion of the entire Work not later than . . . *30 weeks from said start date*.

2.3. Subject to adjustment of this Contract Time as provided in the Contract Documents. . . .

ARTICLE 3
CONTRACT SUM

3.1 The Owner shall pay the Contractor in current funds for the Contractor's performance of the Contract the Contract Sum of *One million three hundred fifty-seven thousand and .00 Dollars ($1,357,000.00)*, subject to addition as and deductions as provided in the Contract Document).

3.2 The Contract Sum is based upon the following alternatives, if any, which are described in the Contract Documents and are hereby accepted by the Owner: *N/A* . . . .

3.3 Unit prices, if any are as follows: *N/A*

ARTICLE 4
PROGRESS PAYMENTS

4.1 Based upon Applications for Payment submitted to the Architect by the Contractor and Certificates for Payment issued by the Architect, the Owner shall make progress payments on

account of the Contract Sum to the Contractor as provided below and elsewhere in the Contract Documents. The period covered by each Application for Payment shall be one calendar month ending on the last day of the month, or as follows:

4.2 Payments due and unpaid under the Contract shall bear interest from the date payment is due at the rate stated below, or in the absence thereof, at the legal rate prevailing from time to time at the place where the Project is located. . . .

ARTICLE 5
FINAL PAYMENT

5.1 Final payment, constituting the entire unpaid balance of the Contract Sum, shall be made by the Owner to the Contractor when the Work has been completed, the Contract fully performed, and a final Certificate for Payment has been issued by the Architect.

ARTICLE 6
ENUMERATION OF CONTRACT DOCUMENTS

6.1 The Contract Documents are listed in Article 7 and, except for Modifications issued after execution of this Agreement, are enumerated as follows:

6.1.1 The Agreement is this executed Abbreviated Form of Agreement Between Owner and Contractor, AIA Document A107, 1987 Edition.

6.1.2 The Supplementary and other Conditions of the Contract are those contained in the Project Manual dated ___ _____, and are as follows:

Document	Title	Pages

Drawings & Documents prepared by Quality Machine Fab Works. . . .

6.1.3 The Specifications are those contained in the Project Manual dated as in Subparagraph 6.1.2, and are as follows: . . .

Section	Title	Pages

Specifications by Quality Fab

6.1.4 The Drawings are as follows, and are dated _____ unless a different date is shown below: . . .

Number	Title	Pages

Drawings by Quality Fab

6.1.5 The Addenda, if any, are as follows:

Number	Title	Pages

Portions of Addenda relating to bidding requirements are not part of the Contract Documents unless the bidding requirements are also enumerated in this Article 6.

6.1.6 Other documents, if any, forming part of the Contract Documents are as follows: . . .

GENERAL CONDITIONS

ARTICLE 7
CONTRACT DOCUMENTS

7.1 The Contract documents consist of this Agreement with Conditions of the Contract (General, Supplementary and other Conditions), Drawings, Specifications, addenda issued prior to the execution of this Agreement, other documents listed in this Agreement and Modifications issued after execution of this Agreement. The Intent of the Contract Documents is to include all items necessary for the proper execution and completion of the Work by the Contractor. The Contract Documents are complementary, and what is required by one shall be as binding as if required by all; performance by the Contractor shall be required only to the extent consistent with

the Contract Documents and reasonably inferable from them as being necessary to produce the intended results.

7.2 The Contract Documents shall not be construed to create a contractual relationship of any kind (1) between the Architect and Contractor, (2) between the Owner and a Subcontractor or Sub-subcontractor or (3) between any persons or entities other than the Owner and Contractor.

7.3 Execution of the Contract by the Contractor is a representation that the Contractor has visited the site and become familiar with the local conditions under which the Work is to be performed.

7.4 The term "Work" means the construction and services required by the Contract Documents, whether completed or partially completed, and includes all other labor, materials, equipment and services provided or to be provided by the Contractor to fulfill the contractor's obligations. The Work may constitute the whole or a part of the Project.

ARTICLE 8
OWNER

8.1 The Owner shall furnish surveys and a legal description of the site.

8.2 Except for permits and fees which are the responsibility of the Contractor under the Contract Documents, the Owner shall secure and pay for necessary approvals, easements, assessments and charges required for the construction, use or occupancy of permanent structures or permanent changes in existing facilities.

8.3 If the Contractor fails to correct Work which is not in accordance with the requirements of the Contract Documents or persistently fails to carry out the Work in accordance with the Contract Documents, the Owner, by a written order, may order the Contractor to stop the Work, or any portion thereof, until the cause for such order has been eliminated; however, the

right of the Owner to stop the Work shall not give rise to a duty on the part of the Owner to exercise this right for the benefit of the Contractor or any other person or entity.

ARTICLE 9
CONTRACTOR

9.1 The Contractor shall supervise and direct the Work, using the Contractor's best skill and attention. The Contractor shall be solely responsible for and have control over construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under the Contract, unless Contract Documents give other specific instructions concerning these matters.

9.2 Unless otherwise provided in the Contract Documents, the Contractor shall provide and pay for labor, materials, equipment, tools, construction equipment and machinery, water, heat, utilities, transportation, and other facilities and services necessary for the proper execution and completion of the Work, whether temporary or permanent and whether or not incorporated or to be incorporated in the Work.

9.3 The Contractor shall enforce strict discipline and good order among the Contractor's employees and other persons carrying out the Contract. The Contractor shall not permit employment of unfit persons or persons not skilled in tasks assigned to them.

9.4 The Contractor warrants to the Owner and Architect that materials and equipment furnished under the Contract will be of good quality and new unless otherwise required or permitted by the Contract Documents, that the Work will be free from defects not inherent in the quality required or permitted, and that the Work will conform with the requirements of the Contract Documents. Work not conforming to these requirements, including substitutions not properly approved and authorized, may be considered defective. The Contractor's warranty excludes remedy for

damage or defect caused by abuse, modifications not executed by the Contractor, improper or insufficient maintenance, improper operation, or normal wear and tear under normal usage. If required by the Architect, the Contractor shall furnish satisfactory evidence as to the kind and quality of materials and equipment.

9.5 Unless otherwise provided in the Contract Documents, the Contractor shall pay sales, consumer, use, and other similar taxes which are legally enacted when bids are received or negotiations concluded, whether or not yet effective or merely scheduled to go into effect, and shall secure and pay for the building permit and other permits and governmental fees, licenses and inspections necessary for proper execution and completion of the Work.

9.6 The Contraction shall comply with and give notices required by laws, ordinances, rules, regulations, and lawful orders of public authorities bearing on performance of the Work. The Contractor shall promptly notify the Architect and Owner if the Drawings and Specifications are observed by the Contractor to be at variance therewith.

9.7 The Contractor shall be responsible to the Owner for the acts and omissions of the Contractor's employees, Subcontractors and their agents and employees, and other persons performing portions of the Work under a contract with the Contractor.

9.8 The Contractor shall review, approve and submit to the Architect Shop Drawings, Product Data, Samples and similar submittals required by the Contract Documents with reasonable promptness. The Work shall be in accordance with approved submittals. When professional certification of performance criteria of materials, systems or equipment is required by the Contract Documents, the Architect shall be entitled to rely upon the accuracy and completeness of such certifications.

9.9 The Contractor shall keep the premises and surrounding area free from accumulation of waste materials or rubbish caused by operations under the Contract. At completion of the Work the Contractor shall remove from and about the Project waste materials, rubbish, the Contractor's tools, construction equipment, machinery and surplus materials.

9.10 The Contractor shall provide the Owner and Architect access in the Work in preparation and progress wherever located.

9.11 The Contractor shall pay all royalties and license fees, shall defend suits or claims for infringement of patent rights and shall hold the Owner harmless from loss on account thereof, but shall not be responsible for such defense or loss when a particular design, process or product of a particular manufacturer or manufacturers is required by the Contract Documents unless the Contractor has reason to believe that there is an infringement of patent.

9.12 To the fullest extent permitted by law, the Contractor shall indemnify and hold harmless the Owner, Architect, Architect's consultants, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself) including loss of use resulting therefrom, but only to the extent caused in whole or in part by negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in this Paragraph 9.12.

9.12.1 In claims against any person or entity indemnified under this Paragraph 9.12 by an employee of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, the indemnification obligation under this Paragraph 9.12 shall not be limited by a limitation on amount or type of damages, compensation or benefits payable by or for the Contractor or a Subcontractor under workers' or workmen's compensation acts, disability benefit acts or other employee benefit acts.

9.12.2 The obligations of the Contractor under this Paragraph 9.12 shall not extend to the liability of the Architect, the Architect's consultants, and agents and employees of any of them arising out of (1) the preparation or approval of maps, drawings, opinions, reports, surveys, Change Orders, Construction Change Directives, designs or specifications, or (2) the giving of or the failure to give directions or instructions by the Architect, the Architect's consultants, and agents and employees of any of them provided such giving or failure to give is the primary cause of the injury or damage.

ARTICLE 10
ADMINISTRATION OF THE CONTRACT

10.1 The Architect will provide administration of the Contract and will be the Owner's representative (1) during construction, (2) until final payment is due and (3) with the Owner's concurrence, from time to time during the correction period described in Paragraph 18.1.

10.2 The Architect will visit the site at intervals appropriate to the stage of construction to become generally familiar with the progress and quality of the completed Work and to determine in general if the Work is being performed in a manner indicating that the Work, when completed, will be in accordance with the Contract Documents. However, the Architect will not be required to make exhaustive or continuous on-site inspections to check quality or quantity of

the Work. On the basis of on-site observations as an architect, the Architect will keep the Owner informed of progress of the Work and will endeavor to guard the Owner against defects and deficiencies in the Work.

10.3 The Architect will not have control over or charge of and will not be responsible for construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the Work, since these are solely the Contractor's responsibility as provided in paragraphs 9.1 and 16.1. The Architect will not be responsible for the Contractor's failure to carry out the Work in accordance with the Contract Documents.

10.4 Based on the Architect's observations and evaluations of the Contractor's Applications for Payment, the Architect will review and certify the amounts due the Contractor and will issue Certificates for Payment in such amounts.

10.5 The Architect will interpret and decide matters concerning performance under and requirements of the Contract Documents on written request of either the Owner or Contractor. The Architect will make initial decisions on all claims, disputes or other matters in question between the Owner and Contractor, but will not be liable for results of any interpretations or decisions rendered in good faith. The Architect's decisions in matters relating to aesthetic effect will be final if consistent with the intent expressed in the Contract Documents. All other decisions of the Architect, except those which have been waived by making or acceptance of final payment, shall be subject to arbitration upon the written demand of either party.

10.6 The Architect will have authority to reject Work which does not conform to the Contract Documents.

10.7 The Architect will review and approve or take other appropriate action upon the Contractor's submittals such as Shop Drawings, Product Data and Samples, but only for the

limited purpose of checking for conformance with information given and the design concept expressed in the Contract Documents.

10.8 All claims or disputes between the Contractor and the Owner arising out or relating to the Contract, or the breach thereof, shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association currently in effect unless the parties mutually agree otherwise and subject to an initial presentation of the claim or dispute to the Architect as required under Paragraphs 10.5. Notice of the demand for arbitration shall be filed in writing with the other party to this Agreement and with the American Arbitration Association and shall be made within a reasonable time after the dispute has arisen. The award rendered by the arbitrator or arbitrators shall be final, and judgement may be entered upon it in accordance with applicable law in any court having jurisdiction thereof. Except by written consent of the person or entity sought to be joined, no arbitration arising out of or relating to the Contract Documents shall include, by consolidation, joinder or in any other manner, any person or entity not a party to the Agreement under which such arbitration arises, unless it is shown at the time the demand for arbitration is filed that (1) such person or entity is substantially involved in a common question of fact or law, (2) the presence of such person or entity is required if complete relief is to be accorded in the arbitration, (3) the interest or responsibility of such person or entity in the matter is not insubstantial, and (4) such person or entity is not the Architect or any of the Architect's employees or consultants. The agreement herein among the parties to the Agreement and any other written agreement to arbitrate referred to herein shall be specifically enforceable under applicable law in any court having jurisdiction thereof.

ARTICLE 11
SUBCONTRACTS

11.1 A Subcontractor is a person or entity who has a direct contract with the Contractor to perform a portion of the Work at the site.

11.2 Unless otherwise stated in the Contract Documents or the bidding requirements, the Contractor, as soon a practicable after award of the Contract, shall furnish in writing to the Owner through the Architect the names of the Subcontractors for each of the principal portions of the Work. The Contractor shall not contract with any Subcontractor to whom the Owner or Architect has made reasonable and timely objection. The Contractor shall not be required to contract with anyone to whom the Contractor has made reasonable objection. Contracts between the Contractor and Subcontractors shall (1) require each Subcontractor, to the extent of the Work to be performed by the Subcontractor, to be bound to the Contractor by the terms of the Contract Documents, and to assume toward the Contractor all the obligations and responsibilities which the Contractor, by the Contract Documents, assumes toward the Owner and Architect, and (2) allow to the Subcontractor the benefit of all rights, remedies and redress afforded to the Contractor by these Contract Documents.

ARTICLE 12
CONSTRUCTION BY OWNER OR BY SEPARATE CONTRACTORS

12.1 The Owner reserves the right to perform construction or operations related to the Project with the Owner's own forces, and to award separate contracts in connection with other portions of the Project or other construction or operations on the site under conditions of the contract identical or substantially similar to these, including those portions related to Insurance and waiver of subrogation. If the Contractor claims that delay or additional cost is involved because of such

action by the Owner, the contractor shall make such claim as provided elsewhere in the Contract Documents.

12.2 The Contractor shall afford the Owner and separate contractors reasonable opportunity for the introduction and storage of their materials and equipment and performance of their activities, and shall connect and coordinate the Contractor's construction and operation with theirs as required by the Contract Documents.

12.3 Costs caused by delays, improperly timed activities or defective construction shall be borne by the party responsible therefor.

ARTICLE 13
CHANGES IN THE WORK

13.1 The Owner, without invalidating the Contract, may order changes in the Work consisting of additions, deletions or modifications, the Contract Sum and Contact Time being adjusted accordingly. Such changes in the Work shall be authorized by written Change Order signed by the Owner, Contractor and Architect, or by written Construction Change Directive signed by the Owner and Architect.

13.2 The Contract Sum and Contract Time shall be changed only by Change Order.

13.3 The cost or credit to the Owner from a change in the Work shall be determined by mutual agreement.

ARTICLE 14
TIME

14.1 Time limits stated in the Contract Documents are of the essence of the Contract. By executing the Agreement the Contractor confirms that the Contract Time is a reasonable period for performing the Work.

14.2 The date of Substantial Completion is the date certified by the Architect in accordance with Paragraph 15.3.

14.3 If the Contractor is delayed at any time in progress of the Work by changes order in the Work, by labor disputes, fire, unusual delay in deliveries, abnormal adverse weather conditions not reasonably anticipatable, unavoidable casualties or any causes beyond the Contractor's control, or by other causes which the Architect determines may justify delay, then the Contract Time shall be extended by Change Order for such reasonable time as the Architect may determine.

ARTICLE 15
PAYMENTS AND COMPLETION

15.1 Payments shall be made as provided in Articles 4 and 5 of this Agreement.

15.2 Payments may be withheld on account of (1) defective Work not remedied, (2) claims filed by third parties, (3) failure of the Contractor to make payments properly to Subcontractors or for labor, materials or equipment, (4) reasonable evidence that the Work cannot be completed for the unpaid balance of the Contract Sum, (5) damage to the Owner or another contractor, (6) reasonable evidence that the Work will not be completed within the Contract Time and that the unpaid balance would not be adequate to cover actual or liquidated damages for the anticipated delay, or (7) persistent failure to carry out the Work in accordance with the Contract Documents.

15.3 When the Architect agrees that the Work is substantially complete, the Architect will issue a Certificate of Substantial Completion.

15.4 Final payment shall not become due until the Contractor has delivered to the Owner a complete release of all liens arising out of this Contract or receipts in full covering all labor, materials and equipment for which a lien could be filed, or a bond satisfactory to the Owner to indemnify the Owner against such lien. If such lien remains unsatisfied after payments are made, the Contractor shall refund to the Owner all money that

the Owner may be compelled to pay in discharging such lien, including all costs and reasonable attorney's fees.

15.5 The making of final payment shall constitute a waiver of claims by the Owner except those arising from:

.1 liens, claims, security interests or encumbrances arising out of the Contract and unsettled;

.2 failure of the Work to comply with the requirements of the Contract Documents; or

.3 terms of special warranties required by the Contract Documents.

Acceptance of final payment by the Contractor, a Subcontractor or material supplier shall constitute a waiver of claims by that payee except those previously made in writing and identified by that payee as unsettled at the time of final Application for Payment.

ARTICLE 16
PROTECTION OF PERSONS AND PROPERTY

16.1 The Contractor shall be responsible for initiating, maintaining, and supervising all safety precautions and programs in connection with the performance of the Contract. The Contractor shall take reasonable precautions for safety of, and shall provide reasonable protection to prevent damage, injury or loss to:

.1 employees on the Work and other persons who may be affected thereby;

.2 the Work and materials and equipment to be incorporated therein; and

.3 other property at the site or adjacent thereto.

The Contractor shall give notices and comply with applicable laws, ordinances, rules, regulations and lawful orders of public authorities bearing on safety of persons and property and their

protection from damage, injury or loss. The Contractor shall promptly remedy damage and loss to property at the site caused in whole or in part by the Contractor, a Subcontractor, a Sub-subcontractor, or anyone directly or indirectly employed by any of them, or by anyone for whose acts they may be liable and for which the Contractor is responsible under Subparagraphs 16.1.2 and 16.1.3, except for damage or loss attributable to acts or omissions of the Owner or Architect or by anyone for whose acts either of them may be liable, and not attributable to the fault or negligence of the Contractor. The foregoing obligations of the Contractor are in addition to the Contractor's obligations under Paragraph 9.12.

16.2 The Contractor shall not be required to perform without consent any Work relating to asbestos or polychlorinated biphenyl (PCB).

ARTICLE 17
INSURANCE

17.1 The Contractor shall purchase from and maintain in a company or companies lawfully authorized to do business in the jurisdiction in which the Project is located insurance for protection from claims under workers' or workmen's compensation acts and other employee benefit acts which are applicable, claims for damages because of bodily injury, including death, and from claims for damages, other than to the Work itself, to property which may arise out of or result from the Contractor's operations under the Contract, whether such operations be by the Contractor or by a Subcontractor or anyone directly or indirectly employed by any of them. This insurance shall be written for not less than limits of liability specified in the Contract Documents or required by law, whichever coverage is greater, and shall include contractual liability insurance applicable to the Contractor's obligations under Paragraph 9.12. Certificates or such insurance shall be filed with the Owner prior to the commencement of the Work.

17.2 The Owner shall be responsible for purchasing and maintaining the owner's usual liability insurance. Optionally, the Owner may purchase and maintain other insurance for self-protection against claims which may arise from operations under the Contract. The Contractor shall not be responsible for purchasing and maintaining this optional Owner's liability insurance unless specifically required by the Contract Documents.

17.3 Unless otherwise provided, the Owner shall purchase and maintain, in a company or companies lawfully authorized to do business in the jurisdiction in which the Project is located, property insurance upon the entire Work at the site to the full insurable value thereof. This insurance shall be on an all-risk policy form and shall include interests of the Owner, the Contractor, Subcontractors and the Sub-subcontractors in the Work and shall insure against the perils of fire and extended coverage and physical loss or damage including, with duplication of coverage, theft, vandalism and malicious mischief.

17.4 A loss insured under Owner's property insurance shall be adjusted with the Owner and made payable to the Owner as fiduciary for the insureds, as their interests may appear, subject to the requirements of any applicable mortgagee clause.

17.5 The Owner shall file a copy of each policy with the Contractor before an exposure to loss may occur. Each policy shall contain a provision that the policy will not be cancelled or allowed to expire until at least 30 days' prior written notice has been given to the Contractor.

17.6 The Owner and Contractor waive all rights against each other and the Architect, Architect's consultants, separate contractors described in Article 12, if any, and any of their subcontractors, sub-subcontractors, agents and employees, for damages caused by fire or other perils to the extent covered by property insurance obtained pursuant to this Article 17 or any

other property insurance applicable to the Work, except such rights as they may have to the proceeds of such insurance held by the Owner as fiduciary. The Contractor shall require similar waivers in favor of the Owner and the Contractor by Subcontractors and Sub-subcontractors. The Owner shall require similar waivers in favor of the Owner and Contractor by the Architect, Architect's consultants, separate contractors described in Article 12, if any, and the subcontractors, sub-subcontractors, agents and employees of any of them.

ARTICLE 18
CORRECTION OF WORK

18.1 The Contractor shall promptly correct Work rejected by the Architect or failing to conform to the requirements of the Contract Documents, whether observed before or after Substantial Completion and whether or not fabricated, installed or completed, and shall correct any Work found to be not in accordance with the requirements of the Contract Documents within a period of one year from the date of Substantial Completion of the Contract or by terms of an applicable special warranty required by the Contract Documents. The provisions of this Article 18 apply to Work done by Subcontractors as well as to Work done by direct employees of the Contractor.

18.2 Nothing contained in this Article 18 shall be construed to establish a period of limitation with respect to other obligations which the Contractor might have under the Contract Documents. Establishment of the time period of one year as described in Paragraph 18.1 relates only to the specific obligations of the Contractor to correct the Work, and has no relationship to the time within which the obligation to comply with the Contract Documents may be sought to be enforced, nor to the time within which proceedings may be commenced to establish the Contractor's liability with respect to the Contractor's obligations other than specifically to correct the Work.

ARTICLE 19
MISCELLANEOUS PROVISIONS

19.1 The Contract shall be governed by the law of the place where the Project is located.

19.2 As between the Owner and the Contractor, any applicable statute of limitations shall commence to run and any alleged cause of action shall be deemed to have accrued:

.1 not later than the date of Substantial Completion for acts or failures to act occurring prior to the relevant date of Substantial Completion;

.2 not later than the date of issuance of the final Certificate for Payment for acts or failures to act occurring subsequent to the relevant date of Substantial Completion and prior to issuance of the final Certificate for Payment; and

.3 not later than the date of the relevant act or failure to act by the Contractor for acts or failures to act occurring after the date of the final Certificate for Payment.

ARTICLE 20
TERMINATION OF THE CONTRACT

20.1 If the Architect fails to recommend payment for a period of 30 days through no fault of the Contractor, or if the Owner fails to make payment thereon for a period of 30 days, the contractor may, upon seven additional days' written notice to the Owner and the Architect, terminate the contract and recover from the Owner payment for all Work executed and for proven loss with respect to materials, equipment, tools, and construction equipment and machinery, including reasonable overhead, profit and damages applicable to the Project.

20.2 If the Contractor defaults or persistently fails or neglects to carry out the Work in accordance with the Contract

Documents or fails to perform a provision of the Contract, the Owner, after seven days' written notice to the Contractor and without prejudice to any other remedy the Owner may have, may make good such deficiencies and may deduct the cost thereof, including compensation for the Architect's services and expenses made necessary thereby, from the payment then or thereafter due the Contractor. Alternatively, at the Owner's option, and upon certification by the Architect that sufficient cause exists to justify such action, the Owner may terminate the contract and take possession of the site and of all materials, equipment, tools, and construction equipment and machinery thereon owned by the Contractor and may finish the Work by whatever method the Owner may deem expedient. If the unpaid balance of the Contract Sum exceeds costs of finishing the Work, including compensation for the Architect's services and expenses made necessary thereby, such excess shall be paid to the Contractor, but if such costs exceed such unpaid balance, the Contractor shall pay the difference to the Owner.

ARTICLE 21
OTHER CONDITIONS OR PROVISIONS

This Agreement entered into as of the day and year first written above.

OWNER	CONTRACTOR
_____	/s/ illegible
(Signature)	(Signature)
_____	_____
(Print name and title)	(Print name and title)

AMERICAN ARBITRATION ASSOCIATION
ARBITRATION TRIBUNAL

In the Matter of the Arbitration Between:

Bill Harbert Construction Company, a division of Bill Harbert International, Inc. ("Harbert")
and
Cortez Byrd Chips, Inc. ("Byrd")

CASE NUMBER: 30 110 00164 97

AWARD OF ARBITRATORS

We, the undersigned Arbitrators, having been designated in accordance with the arbitration agreement entered into by the above-named parties and dated October 16, 1995 and having been duly sworn and having duly heard the proofs and allegations of the parties, AWARD as follows:

Bill Harbert Construction Company ("Harbert") shall have a final adjusted contract amount of $1,845,500.00, which includes Change Order Number One calculated as follows:

Concrete	836 cy @ $175	$146,300.00
Motor Replacement		25,000.00
Structural Backcharges & Added Weight		100,000.00
Electrical Work		29,700.00
Structural Materials		27,000.00
Extended Overhead	8 weeks @ $9,000	72,000.00
Painting		29,000.00
Subtotal		$429,000.00
Overhead & Profit @ 10%		42,900.00
Subtotal		$471,900.00
Gross Receipts Tax @ 3.5%		16,600.00
Total Change Order No. 1		$488,500.00

All amounts previously paid by Cortez Byrd Chips, Inc. ("Byrd") are to be offset against the adjusted contract amount of $1,845,500.00.

The balance due Harbert after deduction of all previous payments is due and payable within sixty (60) days from the award transmittal date. If the balance due Harbert is not paid within sixty (60) days from the award transmittal date, interest at the rate of ten percent (10%) per annum will be applied to the balance due until paid. All other claims of Harbert are denied.

The compensation of the arbitrators totaling Fourteen Thousand Eight Hundred Forty-seven Dollars and 94/100 ($14,847.94) shall be borne by both parties.

The administrative fees and expenses of the American Arbitration Association totaling Six Thousand Eight Hundred Twenty-eight Dollars and No/100 ($6,828.00) shall be borne equally by both parties. Therefore, Byrd shall pay to Harbert the sum of Two Thousand Five Hundred Dollars and No/100 ($2,500.00) for that portion of it share of administrative fees and expenses previously advanced by Harbert to the Association.

December 10, 1997 — /s/ James R. Seale
James R. Seale

December 19, 1997 — /s/ Charles Scallorn
Charles Scallorn

December 12, 1997 — /s/ David C. Dando
David C. Dando

**IN THE SUPREME COURT
OF THE UNITED STATES**

[Caption Omitted in Printing]

Order Granting Petition for a Writ of Certiorari entered on September 10, 1999.

Supreme Court, U.S.
FILED
OCT 25 1999
CLERK

(4)

No. 98-1960

IN THE

Supreme Court of the United States

CORTEZ BYRD CHIPS, INC.,
Petitioner,

v.

BILL HARBERT CONSTRUCTION COMPANY,
A DIVISION OF BILL HARBERT INTERNATIONAL, INC.,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR PETITIONER

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4689

QUESTION PRESENTED

Whether an action to vacate an arbitration award may be brought in the district in which the events in the underlying dispute occurred.

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit (Pet. App. 1a) is reported at 169 F.3d 693. The opinion of the district court denying petitioner's motion to transfer (Pet. App. 8a), the opinions confirming the arbitration award (Pet. App. 5a, 11a), and the judgment (Pet. App. 18a) are unreported.

JURISDICTION

The Eleventh Circuit entered its decision on March 9, 1999. The petition for a writ of certiorari was filed on June 7, 1999, and granted on September 10, 1999. J.A. 3, 64. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The general venue statute, 28 U.S.C. § 1391, provides in pertinent part:

> (a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any defendant is subject to personal jurisdiction at the time the action is commenced, if there is no district in which the action may otherwise be brought.
>
> (b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part

of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought.

(c) For purposes of venue under this chapter, a defendant that is a corporation shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced. . . .

Section 9 of the Federal Arbitration Act provides in pertinent part:

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district in which such award was made.

9 U.S.C. § 9. Section 10 of the Act provides in pertinent part:

the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration . . . .

Id. § 10(a). Sections 9, 10 and 11 of the Act are reprinted in their entirety at 19a-21a.

STATEMENT

On February 12, 1925, Congress enacted what has popularly become known as the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-307. "[R]eversing centuries of judicial hostility to arbitration agreements," *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510 (1974), the FAA announces that any written agreement to arbitrate involving interstate or foreign commerce "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2; *see also Southland Corp. v. Keating*, 465 U.S. 1, 2 (1984) (holding that the FAA "creates a body of federal substantive law . . . applicable in both state and federal courts"). The Act also provides procedural devices for the enforcement of arbitration agreements. *See* 9 U.S.C. § 3 (stays pending arbitration); *id.* § 4 (orders to compel arbitration). In keeping with the FAA's "statutory policy of rapid and unobstructed enforcement of arbitration agreements," *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 23 (1983), these procedures are summary in nature and are initiated by motion rather than complaint. *See* 9 U.S.C. § 6; *see also id.* § 4 (providing for summary trials on the existence of arbitration agreements).

Although arbitration awards, unlike agreements to arbitrate, were specifically enforced at common law, *see Burchell v. Marsh*, 58 U.S. (17 How.) 344, 349 (1854); *see generally* 1 Ian R. MacNeil *et al.*, *Federal Arbitration Law* § 4.3.2.1 (1999), the FAA also deals with the enforcement of arbitration awards. Section 9 provides for applications to confirm arbitration awards, and Sections 10 and 11 provide for applications to vacate, modify, or correct such awards. These applications are also made by motion, *see* 9 U.S.C. §§ 9, 12, and any ruling on such an application "may be enforced as if it had been rendered in an action in the court in which it is entered." *Id.* § 13.

This case concerns the special venue provisions in Sections 9, 10, and 11 of the FAA. Under Section 9, if the parties to an arbitration agreement specify a court in which to enter resulting awards, a party may apply to the specified court for an order confirming the award. *See* 9 U.S.C. § 9. Where no court is

specified, Section 9 provides that "such application may be made to the United States court in and for the district within which such award was made." *Id.* Sections 10 and 11 similarly provide that "the United States court in and for the district wherein the award was made may make an order [vacating, modifying, or correcting] the award upon the application of any party to the arbitration." *Id.* §§ 10-11. The issue before this Court is whether these special venue provisions are exclusive in nature and therefore preclude use of the general venue statute in connection with applications to confirm, vacate, or modify arbitration awards.

The Contract Dispute—Petitioner Cortez Byrd Chips, Inc. is a Mississippi corporation with its principal place of business in Brookhaven, Mississippi, where it produces wood chips for use in the paper-making industry. J.A. 4, 10. Respondent Bill Harbert Construction Company is an unincorporated division of an Alabama corporation that is in the commercial construction business and has its principal place of business in Birmingham, Alabama. J.A. 4, 9. On October 16, 1995, petitioner hired respondent to install a prefabricated chip mill in Brookhaven. J.A. 5, 10, 28-30.

In connection with this engagement, the parties executed a standard construction contract. J.A. 5, 11, 41-63. The contract, which is governed by Mississippi law (J.A. 60), provided that petitioner would pay respondent $1,357,000, "subject to additions and deductions as provided in the Contract Document," for installation of the chip mill. J.A. 43. Article 13 of the contract provided that any additions, deletions, or modifications to the project "shall be authorized by written Change Order signed by the Owner, Contractor and Architect, or by written Construction Change Directive signed by the Owner and Architects." J.A. 54. The contract further stated that the price "shall be changed only by Change Order." J.A. 54.

After the chip mill was installed, respondent sought an upward adjustment in the contract price. J.A. 11. Petitioner refused to pay because, among other things, no written change order had been executed as required by Article 13 of the contract. J.A. 11-12. Although petitioner eventually paid respondent an extra $200,000 above the contract price in hopes of resolving their dispute, respondent was unsatisfied and sought arbitration. *Id.* The contract required that any disputes between the parties "be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association currently in effect." J.A. 52; *see also* J.A. 60 (providing that any arbitration award may be enforced "in accordance with applicable law in any court having jurisdiction thereof").

The Arbitration—The parties chose arbitrators from Alabama, Tennessee, and Texas, and the American Arbitration Association elected to hold hearings in Birmingham, Alabama, where respondent is located. J.A. 11; Pet. App. 9a. During these hearings, counsel for respondent admitted that written change orders were not executed. J.A. 12.[1] Nevertheless, on December 19, 1997, the arbitration panel awarded respondent an upward adjustment of $488,500 based upon a fictitious "Total Change Order No. 1." J.A. 12-13, 62-63.

The Proceedings Below—On January 13, 1998, petitioner filed a complaint in the United States District Court for the Southern District of Mississippi, the district where it resides and the chip mill was installed, seeking an order vacating the

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[1] Although respondent has denied that any admission was made during the arbitration hearings, *see* Pet. Opp. at 1 n.1, the transcripts of the hearings belie that representation. In any event, because the trial court entered judgment without permitting petitioner to submit any evidence, *see infra* p. 7, petitioner's allegation that an admission was made (J.A. 12) must be taken as true at this stage. *See, e.g., Walker Process Equip., Inc. v. Food Mach. & Chem. Co.*, 382 U.S. 172, 174-75 (1965); *see generally Conley v. Gibson*, 355 U.S. 41, 45 (1957).

arbitration award. J.A. 21-26. Approximately one week later, respondent filed a "Complaint to Enforce Arbitration Award" in the United States District Court for the Northern District of Alabama, where the arbitration was held and respondent resides. J.A. 4-7. Petitioner responded in the Alabama action with an answer and a counterclaim seeking to vacate the award. J.A. 8-16.

The central question addressed by the trial court was venue. Because the Mississippi action was filed before the Alabama action, petitioner moved to dismiss, transfer, or stay the Alabama action based upon the first-filed doctrine. J.A. 17-20; *see generally* 17 Linda S. Mullenix & Georgene M. Vairo, *Moore's Federal Practice* § 111.13 [1][o] [ii] (1999). On April 24, 1997, Judge J. Foy Guin, Jr. of the Northern District of Alabama denied that motion.

Judge Guin did not dispute that the first-filed doctrine normally requires federal district courts to consolidate proceedings before the first court seized of the issue. Instead, he found the doctrine inapplicable because "[t]he PLACE of arbitration determines the jurisdiction of the court" under Section 9 of the FAA, Pet. App. 10a, and he held that the Northern District of Alabama had "*exclusive* authority to adjudicate the action to vacate, modify, or correct the award" because the arbitration hearings were conducted in that district. *Id.* Although petitioner pointed out that the Fifth Circuit had recently held that venue under the FAA was not exclusive in *Sutter Corp. v. P & P Industries, Inc.*, 125 F.3d 914 (5th Cir. 1997), the district court ruled that it was bound by an earlier Fifth Circuit decision, *City of Naples v. Prepakt Concrete Co.*, 490 F.2d 182 (5th Cir.), *cert. denied*, 419 U.S. 843 (1974), which was rendered before the creation of the Eleventh Circuit, Pet. App. 9a-10a, even though in *Sutter* the Fifth Circuit had specifically distinguished its prior decision in *City of Naples*. Pet. App. 3.

On May 18, 1998, respondent filed a "renewed" motion to confirm the arbitration award and a supporting memorandum of law. J.A. 1. Respondent styled this motion a "renewed" motion on the theory that its complaint had really been a motion to confirm; respondent likewise asserted that the counterclaim in petitioner's answer had really been a motion to vacate. The trial court agreed and granted respondent's motion on May 20, 1998. Pet. App. 12a-13a. Petitioner had not, however, filed a memoranda of law with its original pleadings, and it had no opportunity to file a memorandum in response to the "renewed" motion in the two days between the filing of that motion and the judge's ruling. *Id.* Nevertheless, the trial court found that the motions to vacate and confirm had "been fully briefed" and that the record was "absent a valid ground for *vacatur* or modification." *Id.*; *see also id.* at 16a-17a nn.1-2 (deeming respondent's complaint to be a motion to confirm and petitioner's answer a motion to vacate).[2]

On appeal the Eleventh Circuit also focused on the issue of venue. Although petitioner argued that the Southern District of Mississippi was a proper venue for its application to vacate under the general venue statute and that the trial court should therefore have transferred the case there under the first-filed doctrine, the court of appeals held that the Northern District of Alabama, as the district in which the arbitration award was made, had exclusive venue under Sections 9 and 10 of the FAA over applications to vacate or confirm that award. Pet. App.

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[2] Had petitioner been permitted to file a memorandum and present its case, it would have shown that the arbitration award arbitrarily disregarded the terms of the contract and therefore did not draw its essence from the contract at issue in this case. Although arbitrators have considerable discretion, they do not have authority either to create documents out of thin air or ignore conditions imposed by the contracts before them. *See, e.g., Coast Trading Co. v. Pacific Molasses Co.*, 681 F.2d 1195, 1198 (9th Cir. 1982); *see generally United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

2a-4a. The court did not, however, explain how it derived this conclusion from the language of Sections 9 and 10. Instead, much like the trial court, the Eleventh Circuit simply stated that "it appears to us that [*City of Naples*] controls this panel's decision." *Id.* at 3a.

SUMMARY OF ARGUMENT

1. This case is governed by the plain language of the Federal Arbitration Act, 9 U.S.C. §§ 1-307. Nothing in the Act's special venue provisions precludes applications to confirm, vacate, or modify arbitration awards from being filed in venues otherwise authorized by the general venue statute. Those provisions merely state that, absent an agreement, applications to confirm, vacate, or modify arbitration awards "may" be brought in the district in which the award was made. *See* 9 U.S.C. §§ 9-11. In ordinary English, the word "may" is a permissive term. Moreover, where Congress has intended special venue provisions to preclude the use of the general venue statute, it has traditionally used explicitly restrictive language and stated that suits "must" or "may only" be brought in certain venues. That practice and the use of such restrictive language elsewhere in Section 9 and in other provisions of the FAA belie any suggestion that Congress was departing from ordinary usage in the FAA's special venue provisions.

The structure of the FAA also demonstrates that the Act's special venue provisions complement rather than supplant the general venue statute. First, the restrictive and exclusionary interpretation adopted by the court of appeals below would create an irrational and unintended distinction between ordinary arbitrations and those covered by amend-ments implementing foreign conventions on arbitration because the latter are subject to indisputably broad venue provisions, *see* 9 U.S.C. §§ 204, 207, which Congress did not intend to expand venue. Second, the interpretation adopted below suggests that the FAA as originally enacted had no provision for enforcing awards in arbitrations conducted abroad. Arbitration, however, plays an

indispensable role in international business, and, as the original terms of the FAA amply demonstrate, Congress always intended the Act to apply to international arbitrations.

A restrictive and exclusionary interpretation of the FAA's special venue provisions also defies common sense. Those provisions were enacted in response to the narrow venue rules prevailing in 1925, which did not permit applications to confirm or vacate arbitration awards to be brought in the district in which the award was made or even in the district in which the parties had agreed to bring such applications. Because such districts are presumably convenient places to bring applications to vacate or confirm an arbitration award, Congress had good reason to enact special venue provisions extending venue to those districts. There is, however, no apparent reason why Congress would also have intended to prevent such applications in districts where the defendant resides or in any other district authorized under the general venue statute.

2. In addition to contradicting the plain language of the FAA, the structure of the FAA, and common sense, the decision below also conflicts with this Court's decision in *Pure Oil Company v. Suarez*, 384 U.S. 494 (1966), and the historical treatment of special venue provisions. Historically, Congress has used special venue provisions to expand the choice of fora in special classes of cases beyond the traditionally limited scope of the general venue statute. In light of this practice, and the well-settled principle that federal statutes should not be interpreted to conflict unnecessarily absent a clearly expressed congressional intention to the contrary, courts have presumed that special venue statutes are supplemented by the general venue statute. Indeed, in *Suarez* this Court applied that presumption to a case that is indistinguishable from this one. Moreover, respondent cannot satisfy the burden imposed by *Suarez* of proving that Congress intended to preclude application of the general venue statute

because both the legislative history and the purposes of the FAA show that Congress had no such intent.

3. The vast majority of courts and commentators have concluded that the FAA's special venue provisions are not exclusive and do not preclude reliance upon the general venue statute. Of the ten courts of appeals to consider whether the FAA precludes application of the general venue statute to applications to confirm or vacate an award, seven have concluded that the Act does not, and district courts in two additional circuits have agreed. By contrast, counting the decision below, only three circuits have taken the opposite view. Moreover, these courts have failed to offer any justification, textual or otherwise, for their decidedly minority view.

ARGUMENT

It is not disputed that petitioner was authorized under the general venue statute, 28 U.S.C. § 1391, to sue respondent in the Southern District of Mississippi. Because the dispute underlying this case occurred in that district, and the respondent corporation transacted business there, venue was plainly proper under the statute. *See* 28 U.S.C. § 1391(a), (c). Nor is it disputed that petitioner filed suit in the Southern District of Mississippi before respondent filed this case in the Northern District of Alabama. Because the court below refused to transfer the Alabama action to the Southern District of Mississippi on the ground that the latter district was not a proper venue under the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-307, the question before the Court is whether the FAA's special venue provisions preclude use of the general venue statute in applications to vacate or confirm arbitration awards. As the plain language of the FAA and the general presumption applicable to special venue provisions demonstrate, the answer is no: those provisions do not exclude the general venue statute, but are instead supplemented by it.

I. THE PLAIN LANGUAGE AND STRUCTURE OF THE FAA DEMONSTRATE THAT THE ACT'S SPECIAL VENUE PROVISIONS DO NOT PRECLUDE USE OF THE GENERAL VENUE STATUTE.

It is well-settled that in interpreting a statute, one must "look first to its language, giving the words used their ordinary meaning." *Moskal v. United States*, 498 U.S. 103, 108 (1990) (quotations and citations omitted). Moreover, "when a statute speaks with clarity to an issue, judicial inquiry into the statute's meaning, in all but the most extraordinary circumstances, is finished." *Metropolitan Stevedoring Co. v. Rambo*, 515 U.S. 291, 295 (1995) (quotation omitted). Here, the plain language and structure of the FAA's special venue provisions demonstrate that those provisions are not exclusive and therefore did not preclude petitioner from filing suit in the Southern District of Mississippi pursuant to the general venue statute.

1. The special venue provisions at issue here are contained in Sections 9, 10, and 11 of the Federal Arbitration Act. Section 9 provides in pertinent part:

> If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made.

9 U.S.C. § 9. The venue provisions of Sections 10 and 11 are similar: they state that "the United States court in and for the district wherein the award was made may make an order

[vacating, modifying, or correcting] the award upon the application of any party to the arbitration." *Id.* §§ 10-11 (emphasis added).

Where there is no agreement on the forum for applications to confirm, vacate, or modify, these special venue provisions permit such applications to be filed in the district in which the arbitration award was made even if that district would not otherwise be a proper venue. They do not, however, require parties to file applications in the district in which the award was made, and they do not preclude reliance upon the general venue statute. To the contrary, the FAA's special venue provisions simply state that an application to confirm "*may* be made to the United States court in and for the district within which such award was made" and that that court "*may* make an order" to vacate, modify or correct upon application. *Id.* §§ 9-11 (emphasis added).

In ordinary English, the word "may" is a "permissive term." *Barlow v. Collins*, 397 U.S. 159, 166 (1970). In a context such as this one, it is "used to express possibility, opportunity, or permission." *The Random House Dictionary of the English Language* 886 (Unabridged ed. 1973); *see also The American Heritage Dictionary of the English Language* 1112 (3d ed. 1992) (defining "may" to mean "[t]o be allowed or permitted to"); *Encarta World English Dictionary* 1117 (1999) (noting that may "indicates permission"); *Webster's Third New International Dictionary* 1396 (1986) (defining "may" to mean to "have permission to"). Accordingly, when the word "may" is used in a statute, it "usually implies some degree of discretion." *United States v. Rogers*, 461 U.S. 677, 706 (1983); *see also Apex Plumbing Supply, Inc. v. U.S. Supply Co., Inc.*, 142 F.3d 188, 192 (4th Cir.) (noting that the word "normally confers a discretionary power, not a mandatory power"), *cert. denied*, 119 S. Ct. 178 (1998).

While it is true that statutes using the word "may" have on occasion been interpreted to be mandatory, *see, e.g., Rogers*,

461 U.S. at 706; *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222 (1957), it is clear from the context in which that language is used that the word is not being employed in such an unusual sense in the FAA's special venue provisions. For example, Section 9 states that notice of an application to confirm "shall" be served upon the adverse party and that courts "must" grant an order confirming the award unless the award is vacated, modified, or corrected under Sections 10 or 11. *See* 9 U.S.C. § 9. Other sections of the FAA contain similarly mandatory language. *See, e.g., id.* § 2 (providing that written arbitration agreements "*shall* be valid, irrevocable, and enforceable") (emphasis added); *id.* § 12 ("Notice of a motion to vacate, modify, or correct an award *must* be served . . . within three months after the award is filed or delivered.") (emphasis added).[3] When the word "may" is so employed "in special contradistinction" to mandatory terms such as "shall" or "must," the inference is clear and unmistakable: the word is being used in its ordinary, permissive sense. *United States ex rel. Siegel v. Thoman*, 156 U.S. 353, 359 (1895); *see also Anderson v. Yungkau*, 329 U.S. 482, 485 (1947) (observing that, when a provision "uses both 'may' and 'shall,' the normal inference is that each is used in its usual sense—the one act being permissive and the other mandatory").

Moreover, as a number of courts of appeals have recognized, "when Congress intends for one specific district court to be the exclusive forum for a certain matter, it uses unambiguous language to express its intention." *P & P Indus.*,

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[3] *See also* 9 U.S.C. § 3 (stating when stays "shall" be issued); *id.* § 4 (stating that "the court *shall* make an order directing the parties to proceed to arbitration") (emphasis added); *id.* § 6 (providing that applications "shall" be made and heard as motions); *id.* § 13 (providing that parties moving for an order "shall" file certain papers at the time the order is filed).

Inc. v. Sutter Corp., 179 F.3d 861, 869 (10th Cir. 1999).[4] For example, the Miller Act, 40 U.S.C. § 270a *et seq.*, provides that certain suits "*shall* be brought . . . in the United States District Court for any district in which the contract was to be performed an executed *and not elsewhere*." 40 U.S.C. § 270b(b) (emphasis added). The Clean Air Act, 42 U.S.C. § 7401 *et seq.*, provides that citizen suits relating to pollution from a stationary source "may be brought *only* in the judicial district in which such source is located." 42 U.S.C. § 7604(c)(1) (emphasis added). Other statutes contain similarly restrictive language,[5] and still others provide that civil actions "must be brought" in a particular district.[6]

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[4] *See also Apex*, 142 F.3d at 192-93 (noting that Congress has usually employed "explicit language" when it intends a special venue provision to be exclusive); *In re VMS Secs. Litig.*, 21 F.3d 139, 144 (7th Cir. 1994) (same); *Smiga v. Dean Witter Reynolds, Inc.*, 766 F.2d 698, 706 (2d Cir. 1985) (same), *cert. denied*, 475 U.S. 1067 (1986).

[5] *See, e.g.*, 28 U.S.C. § 1398(a) (providing that civil actions relating to orders of the Surface Transportation Board "*shall* be brought *only* in a judicial district in which any of the parties bringing the action resides or has its principal office") (emphasis added); *id.* § 1402(b) (providing that certain civil actions against the United States defendant "may be prosecuted *only* in the judicial district where the plaintiff resides or wherein the act or omission complained of occurred") (emphasis added); 30 U.S.C. § 1270(f) (providing that persons injured by violations of the Surface Mining Reclamation and Enforcement Act "may bring an action for damages . . . *only* in the judicial district in which the surface coal mining operation complained of is located") (emphasis added); 33 U.S.C. § 1365(c)(1) (providing that citizen suits under the Water Pollution Control Act relating to discharge sources "may be brought under this section *only* in the judicial district in which such source is located") (emphasis added).

[6] *See, e.g.*, 49 U.S.C. § 20104(c) (providing that actions to compel issuance of emergency safety orders by the Secretary of Transportation "*must* be brought in the judicial district in which the emergency situation is alleged to exist, in which that employing carrier has its principal executive office, or for the District of Columbia") (emphasis added); *id.* § 30121(d) (noting that civil actions concerning motor vehicle standards "*must* be brought in the United States district court for a judicial district in the State in which the manufacturer is incorporated or the District of Columbia") (emphasis added).

In short, where Congress intends a special venue provision to be exclusive, it can—and normally does—make that intention clear in the language of the provision. Thus, the absence of any restrictive or exclusionary language in the special venue provisions in Sections 9, 10, and 11 of the FAA confirms that the permissive language of these provisions do not preclude use of the general venue statute in connection with applications to confirm, vacate, or modify arbitration awards.

2. In addition to being inconsistent with the plain language of the FAA's special venue provisions, the restrictive interpretation adopted by the court below conflicts with the structure of the Act.

First, this interpretation creates an irrational distinction between ordinary domestic and international arbitrations and those international arbitrations subject to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the 1975 InterAmerican Convention on International Commercial Arbitration. The legislation implementing those conventions provides parties applying to confirm awards subject to those conventions with an indisputably broad choice of venues.[7] Far from suggesting any

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[7] *See* 9 U.S.C. § 204 (providing for venue in any court with jurisdiction "in which save for the arbitration agreement an action or proceeding with respect to the controversy between the parties could be brought"); *id.* § 207 (stating that parties "may apply to any court having jurisdiction . . . for an order confirming the award against any other party to the arbitration"); *id.* § 302 (applying Sections 204 and 207 to cases under the Inter-American Convention).

reason why venue in cases subject to these conventions should be broader than in regular cases, the legislative history of the conventions' venue provisions states that "[t]he venue provisions in section 204 of the new chapter are substantially the same as those of the original act." S. Rep. No. 91-702, at 7 (1970). Thus, the decision below creates a distinction among arbitration cases that Congress plainly did not intend.

Second, the interpretation adopted by the decision below would create a gap in the venue available under the FAA. Under that interpretation, in the absence of an agreement, Section 9 would permit an application to confirm an arbitration award to be brought only in the "United States District Court in and for the district within which such an award was made." 9 U.S.C. § 9. If, however, that were the case, then the FAA as originally enacted would not have provided for the enforcement of any arbitrations conducted outside this country because there is no United States District Court in and for the districts of London, Paris, or any other foreign location in which such arbitrations might be held. As Congress does not "in general intend to create venue gaps," *Brunette Mach. Works, Ltd. v. Kockum Indus., Inc.*, 406 U.S. 706, 710 n.8 (1972), this Court has declared that "in construing venue statutes it is reasonable to prefer the construction that avoids leaving such a gap." *Id.*

Moreover, the gap that an exclusive interpretation would create is unreasonable. Arbitration plays an indispensable role in achieving the "orderliness and predictability essential to any international business transaction," *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516 (1974). Not surprisingly, when Congress passed the FAA in 1925, it contemplated that the original provisions of the Act would apply to international arbitrations. *See* 9 U.S.C. § 1 (defining maritime transactions to include "matters in foreign commerce" and "commerce" to include commere "between any . . . Territory and any State or foreign nation"). As a consequence, any interpretation of the

FAA's special venue provisions that would have prevented enforcement of foreign arbitration awards under the statute as originally enacted must be rejected. *See* IV MacNeil, *Federal Arbitration Law* § 44.9.1, at 44:61 to 44:62.

3. The suggestion that the FAA's special venue provisions preclude use of the general venue statute also defies common sense. When the FAA was enacted in 1925, the general venue statute was quite narrow: as a practical matter, it permitted parties to file only in the district in which the defendant resided. *See* 28 U.S.C. § 112(a) (1926 ed.) (providing that "no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant").[8] In addition, at the time that the FAA was passed, forum selection clauses were disfavored, and courts frequently "declined to enforce such clauses." *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 19 (1972). Consequently, prior to the enactment of the FAA's special venue provisions, parties could not have been sure that agreements specifying the court that would enter an arbitration award would be honored or that they could enforce an arbitration award in the district in which it was made unless the defendant in those proceedings happened to be a resident of that district. Since both districts are presumably convenient venues for applications to confirm, vacate, or modify arbitra-

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[8] In 1925, the general venue statute also contained a provision authorizing venue in diversity cases in "the district of the residence . . . of the plaintiff." 28 U.S.C. § 112(a) (1926 ed.); *see also Moses H. Cone*, 460 U.S. at 25 n.32 (noting that the FAA "does not create any independent federal question jurisdiction"). This provision had little practical significance, however, because under the restrictive rules prevailing prior to this Court's decision in *International Shoe Co. v. State of Washington*, 326 U.S. 310 (1945), personal jurisdiction could rarely be exercised over a defendant outside his or her residence. *See* Jack H. Friedenthal *et al.*, *Civil Procedure* 80-81 n.5 (3d ed. 1999); *see generally* 1 Robert C. Casad & William C. Richman, *Jurisdiction in Civil Actions* § 2-2 (3d ed. 1998).

tion awards, permitting applications to be brought in those districts makes good sense.

By contrast, there is no reason to make those districts the exclusive venues for applications to confirm, modify, or vacate for the simple reason that those districts are not always convenient places in which to litigate such applications. Sometimes, for example, the location of an arbitration is selected because it is convenient for the arbitrator.[9] At other times, parties that are geographically separated, in the spirit of compromise, choose a location that is a "rough midway point" between the parties.[10] There is no reason to think that in such circumstances Congress intended to require applications to confirm, vacate, or modify to be brought only where the arbitration was held. However, under the restrictive interpretation adopted in the decision below, that would be the case. *See* 28 U.S.C. § 1404(a) (permitting transfer of an action only to districts "where it might have been brought" initially); *see generally* 17 *Moore's Federal Practice* § 111.12.

Finally, it would have been quite surprising for Congress to preclude parties from employing the general venue statute when it enacted the FAA in 1925. As the primary purpose of

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[9] *See, e.g., Delta Dental of Rhode Island v. Dental Serv. of Massachusetts, Inc.*, 918 F. Supp. 46, 49-50 (D.R.I. 1996) (noting that arbitration hearings were held in Connecticut "largely because it was a centrally convenient location for the three member arbitration panel who were from Rhode Island, New York and New Jersey"); *Denver & R. G. W. R. Co. v. Union Pacific R. Co.*, 868 F. Supp. 1244, 1246 (D. Kan. 1994) (noting the parties agreed to hold arbitration hearing in Missouri at the request of the arbitrator who resided in Tennessee), *aff'd*, 119 F.3d 847 (10th Cir. 1997).

[10] *See, e.g., Alexander Ins. Ltd. v. Executive Life Ins. Co. of New York*, No. 90 civ. 8268, 1991 WL 150224, at *1 n.1 (S.D.N.Y. July 29, 1991) (explaining why arbitration between parties located in Bermuda, New York and California was held in Omaha, Nebraska).

venue statutes is to "protect the defendant against the risk that a plaintiff will select an unfair or inconvenient place of trial," *Leroy v. Great Western United Corp*, 443 U.S. 173, 183-84 (1979) (emphasis omitted), "[t]he defendant's residence is the most common provision for venue." Fleming James, Jr. *et al.*, *Civil Procedure* § 2.23, at 97 (4th ed. 1992); *see also* Edson R. Sunderland, *Judicial Administration: Its Scope & Methods* 820 (1937) ("The place of the defendant's residence . . . is the most widely employed basis for venue in actions not related to tangible property."). In 1925, however, the defendant's residence was the only venue authorized by the general venue statute. *See supra* p.17. As a consequence, when Congress enacted the FAA in 1925, it could hardly have intended to preclude use of the general venue statute.

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S OPINION IN *SUAREZ* AND THE PRESUMPTION THAT SPECIAL VENUE PROVISIONS ARE SUPPLEMENTED BY THE GENERAL VENUE STATUTE.

In addition to being inconsistent with the language and structure of the FAA, the interpretation adopted by the decision below also conflicts with a principle that this Court and others have applied in interpreting special venue provisions: "special venue statutes are supplemented by [the] more liberal general venue statute, absent specific contrary indication." *Monument Builders v. American Cemetery Ass'n*, 891 F.2d 1473, 1477 (10th Cir. 1989); *see generally Pure Oil Co. v. Suarez*, 384 U.S. 202 (1966).[11]

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[11] *See also* 17 *Moore's Federal Procedure* § 110.01[3][b], at 110-16 ("Generally, special venue statutes have been considered to be non-exclusive if the statute was originally intended to expand rather than contract venue."); 15 Charles Alan Wright *et al.*, *Federal Practice & Procedure* § 3803, at 10-11 (2d ed. 1986) (noting that "provisions in the general venue statute are read as supplementing the special statute in the

A. In Light of Their Historical Purpose, Special Venue Statutes Must be Interpreted to be Supplemented by the General Venue Statute Unless There Is Clear Evidence of a Contrary Congressional Intent.

The presumption that special venue provisions are supplemented by the general venue statute is based upon historical practice and supported by well-settled principles of statutory interpretation.

As then-Chief Judge Breyer observed, most special venue statutes were enacted "out of a desire to widen plaintiffs' venue choices." *Howe v. Goldcorp Invs., Ltd.*, 946 F.2d 944, 950 (1st Cir. 1991) (Breyer, C.J.). When the original general venue statute was enacted in 1789, unlike the current version, it did not authorize suits in the district in which "a substantial part of the events or omissions giving rise to the claim occurred" or contain a fallback provision where there is "no district in which the action may otherwise be brought." 28 U.S.C. § 1391(a), (b). Instead, the Judiciary Act of 1789 provided only that "no civil action shall be brought . . . against an inhabitant of the United States . . . in any other district than whereof he is an inhabitant, or in which he shall be found." 1 Stat. 73, 79.

A century later, Congress narrowed the general venue statute even further by removing the authorization for suit were the defendant was found. *See* Judiciary Act of 1887, ch. 373, 24 Stat 552-53 (prohibiting civil actions from being brought against a person "in any other district than that whereof he is an inhabitant"); *see also supra* p. 17 n.8. The statute then remained virtually the same until Congress expanded its scope in the 1940s and 1960s, in large part to reflect modern

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absence of contrary restrictive indications in the special statute"); 1 *Business & Commercial Litigation in Federal Courts* § 3.5, at 136-37 (Robert L. Haig ed. 1998) ("If the special venue statute is not expressly restrictive, the general venue statute may be used to supplement the special statute . . . .").

advances in transportation that permitted parties to litigate conveniently outside the districts of their residence. *See, e.g.*, *Denver & R. G. W. R. Co. v. Brotherhood of R.R. Trainmen*, 387 U.S. 556, 558 (1967) (noting that "for almost 80 years proper venue in federal-question cases was limited to the district of the defendant's residence"); *see generally* Charles Alan Wright, *Law of the Federal Courts* § 42, at 256-67 (5th ed. 1994) (describing the development of the general venue statute).

Prior to this mid-century expansion, special venue provisions were used to expand the choice of fora in specific classes of cases beyond the scope of the general venue statute. *See, e.g.*, Wright, *Law of Federal Courts* § 42, at 267 ("Usually, though not invariably, [special venue] statutes broaden the choice of venue made by the general venue statutes."); John B. Oakley, *Prospectus for the American Law Institute's Federal Judicial Code Revision Project*, 31 U.C. Davis L. Rev. 855, 952 (1998) (noting that most special venue statues were enacted to "broaden what were once the far more narrow venue options stipulated by former subsections 1391(a) and (b)"). Although the traditionally narrow scope of the general venue statute protected defendants from being forced to litigate in distant and inconvenient fora, it also "frequently precluded suit in the most convenient district" for the parties, which was often the district in which the parties interacted and the underlying events occurred. Wright, *Law of the Federal Courts* § 42, at 259; *see also B. & O. R. Co. v. Kepner*, 314 U.S. 44, 49 (1941) (noting the "injustice to an injured employee of compelling him to go to the possibly far distant place of habitation of the defendant carrier"). Accordingly, special venue statutes routinely provided for venue in districts outside the residence of the defendant.

For example, when Congress passed the Clayton Act, 15 U.S.C. § 12 *et seq.*, in 1914, it enacted a special venue provision permitting private antitrust plaintiffs to bring suit wherever

the defendant "resides or is found or has an agent." 15 U.S.C. § 15; *see also id.* § 22 (authorizing antitrust suits against a corporation "not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business"). Similarly, when Congress created private rights of action in the Securities Act of 1933, *id.* § 77a *et seq.*, and the Securities Exchange Act of 1934, *id.* § 78a *et seq.*, it included special venue provisions authorizing suits "in the district in which the defendant is found or is an inhabitant or transacts business, or in the district where the offer or sale took place, if the defendant participated therein." *Id.* §§ 77v(a), 78aa. The Federal Employers' Liability Act, 45 U.S.C. §§ 51-60, which was enacted in 1908, contains a similar provision. *See* 45 U.S.C. § 56 (providing that suits "may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of the action arose, or in which the defendant shall be doing business at the time of commencing such action"). Other special venue provisions similarly authorize suits to be brought outside the district of the defendant's residence.[12]

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[12] *See, e.g.*, 7 U.S.C. § 25(c) ("Any action brought under [the Commodity Exchange Act] may be brought in any judicial district wherein the defendant is found, resides, or transacts business, or the judicial district wherein any act or transaction constituting the violation occurs."); 15 U.S.C. § 1640(e) (providing that suits under the Truth in Lending Act "may be brought in any United States district court, or in any other court of competent jurisdiction"); *id.* § 1222 (providing that automobile dealers "may bring suit against any automobile manufacturer engaged in commerce, in any district court of the United States in the district in which said manufacturer resides, or is found, or has an agent" for failing to act in good faith in franchising); *id.* § 2805(a) (providing that a franchisee may sue a franchisor under the Petroleum Marketing Practices Act "in any judicial district in which the principal place of business of such franchisor is located or in which such franchisee is doing business"); 18 U.S.C. § 1965 (providing that civil claims against defendant under RICO "may be instituted in the district court of the United States for any district in which such person reaides, is found, has an agent, or transacts

The presumption that special venue statutes are supplemented by the general venue statute reflects the historical function served by special venue provisions. Since Congress normally uses special venue provisions to expand venue beyond the traditionally limited scope of the general venue statute, it presumably intends the parties benefitting from that expansion to benefit as well from the general venue statute. Accordingly, in the absence of some special reason to think that Congress was acting unorthodoxly, special venue provisions should be presumed to follow Congress' normal practice and to permit supplementary venue under the general venue statute.

This presumption is supported by a well-settled principle of statutory interpretation. As this Court has repeatedly recognized, "[w]hen two statutes are capable of co-existence . . ., it is the duty of the courts, absent a clearly expressed congressional intention, to regard each as effective." *Vimar Seguros Reaseguros v. M/V Sky Reefer*, 515 U.S. 528, 533 (1995) (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974)). Indeed, this principle applies with especial force here. Although Title 28 contains only a dozen or so special venue provisions, *see* 28 U.S.C. §§ 1394-1403, 1408-10, there are over 300 other such provisions elsewhere in the U.S. Code. *See* Richard H. Fallon, Jr. *et al.*, *Hart & Wechsler's The Federal Courts and the Federal System* 1594 (4th ed. 1996) (discussing American Law Institute, *Study of the Division of Jurisdiction between State and Federal Courts* 498-501 (1969)). There is, however, no reason to think that Congress has taken upon itself the gargantuan task of reviewing each and every one of these provisions every time it adjusts the general

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his affairs"); 43 U.S.C. § 1349(b)(1) (providing that suits under the Outer Continental Shelf Lands Act "may be instituted in the judicial district in which any defendant resides or may be found, or in the judicial district of the State nearest the place the cause of action arose").

venue statute. Furthermore, if most special venue provisions were permitted to preempt the general venue statute, the general venue statute would be subject to a patchwork of arcane and antiquated exceptions. Thus, the principle that federal statutes are (in the absence of clear evidence of a congressional intention to the contrary) to be interpreted to be in harmony with each other should be applied vigorously to special venue provisions.

B. Under this Court's Decision in *Suarez*, the Presumption that Special Venue Provisions Are Supplemented by the General Venue Statute Must Be Applied Here.

This Court applied the presumption that special venue statutes are supplemented by the general venue statute in *Pure Oil Co. v. Suarez*, 384 U.S. 202. Because this case is indistinguishable from *Suarez*, that presumption applies here as well.

In *Suarez*, a seaman sued his employer in Florida district court for injuries suffered on a boat owned and operated by the employer. *See* 384 U.S. at 202-04. Because the employer was a corporation and performed a substantial amount of business in Florida, venue was proper under the 1948 amendment of the general venue statute. *See id.* at 204; *see also* Act of June 25, 1948, ch. 646 § 1391, 62 Stat. 935 (adding the predecessor of 28 U.S.C. § 1391(c)). The employer nonetheless claimed that venue was improper under the special venue provision in the Jones Act, 46 U.S.C. § 688 *et seq.*, which states that "[j]urisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located." 46 U.S.C. § 688. Since corporate residence at the time the Jones Act was passed in 1915 meant state of incorporation, and the employer was neither incorporated in Florida nor had his principal office there, the employer argued that the Jones Act's special venue provision rendered Florida an improper venue. *See Suarez*, 384 U.S. at 203-04.

A unanimous Court rejected this argument. This Court recognized that the Jones Act, as the more specific statute, ultimately controlled. *See Suarez*, 384 U.S. at 203; *see also* 28 U.S.C. § 1391(a) & (b) (providing that the general venue statute applies "except as otherwise provided by law"). It concluded, however, that there was no conflict between the Jones Act's special venue provisions and the general venue statute. This Court's analysis proceeded in three steps. First, this Court found that the 1948 amendment expanding the general venue statute was intended to apply to previously-enacted special venue provisions. *See id.* at 204-05. Although nothing in either the text of the general venue statute or its legislative history touched on the "intended effect of § 1391(c) on special venue provisions," this Court concluded that the amendment was intended to apply to special venue provisions as well because of "the liberalizing purpose underlying its enactment." *Id.*

Second, this Court looked to whether the venue provisions of the Jones Act were intended to be restrictive or exclusionary. Because the Jones Act's special venue provision provided a "more generous choice of forum than would have been available at that time under the general venue statute," this Court concluded that the Jones Act was "intended to liberalize venue" as well. *Id.* at 205, 207.

Third, in light these conclusions, this Court presumed that the Jones Act's special venue provisions were supplemented by the statute and looked to see whether there was any "contrary restrictive indications." *Suarez*, 384 U.S. at 205. Although the special venue provision in question stated where venue "shall be," 46 U.S.C. § 688, the Court found no restrictive indication in this language or elsewhere. Instead, observing that the Jones Act was "not primarily directed at venue" and that its special venue provisions were not discussed in either the committee reports or in the floor debates, this Court found that Congress had no restrictive or exclusionary intent in enacting the Jones

Act's special venue provision and that in fact the "basic intent of the Congress is best furthered by carrying the broader residence definition of § 1391(c) into the Jones Act." *Suarez*, 384 U.S. at 205, 207.

The first two steps in *Suarez*'s analysis are plainly satisfied here. First, like the 1948 amendment expanding the general venue statute's definition of corporate residence, the 1966 amendment to the general venue statute adding transactional venue had the "purpose and effect of liberalizing venue." 17 *Moore's Federal Practice* § 110.01[1], at 110-12. Indeed, when the Judicial Conference proposed making transactional venue generally available, it said the amendment would "further liberalize the venue provisions by authorizing any civil action to be brought in the district where the claim arose." Letter from Warren Olney III to John W. McCormack, January 29, 1965, *reprinted in* S. Rep. No. 89-1752 (1966), *reprinted in* 1966 U.S.C.C.A.N. 3694.

Second, the special venue provisions in the FAA were intended to liberalize venue. As noted above, when these provisions were enacted in 1925, the general venue statute provided only for residential venue, and American courts frequently refused to enforce forum-selection clauses. *See supra* p. 17. By authorizing applications to confirm an arbitration award in the districts specified in such clauses and in "the United States court in and for the district within which such award was made" when there is no such clause, 9 U.S.C. §§ 9-11, the FAA's special venue provisions served a clearly liberalizing purpose.

Consequently, under *Suarez*, the special venue provisions in the FAA must be presumed to be supplemented by the general venue statute. Moreover, as demonstrated in the next section, which addresses the third step in the *Suarez* analysis, respondent cannot overcome this presumption.

C. The Legislative History and Purpose of the FAA Establish that Congress Did Not Intend the FAA's Special Venue Provisions to Preclude Application of the General Venue Statute.

Respondent cannot even begin to meet the burden imposed by *Suarez* to show that Congress had a restrictive intent in passing the FAA's special venue provisions because there is no evidence that Congress intended those provisions to prevent parties applying to confirm or vacate arbitration awards from using the general venue statute. To the contrary, the legislative history and purpose of the FAA establish that Congress had no such intent.

The best evidence of Congress' intent is, of course, "the statutory text adopted by both Houses of Congress and submitted to the President." *West Virginia Univ. Hosps. Inc. v. Casey*, 499 U.S. 83, 98-99 (1991); *see also Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there.") (citations omitted). As demonstrated above, that text belies any suggestion that the FAA's special venue provisions were intended to preclude application of the general venue statute. *See supra* pp. 11-17. Instead, the plain language of the FAA's special venue provisions and the structure of the Act show that Congress did not intend those provisions to be exclusive. Indeed, in contrast to the language of the special venue provision considered in *Suarez*, the relevant language in the FAA provisions is entirely permissive. *See supra* pp. 12-13.

There is no indication in the legislative history of the FAA that Congress intended to restrict venue or define the exact extent of venue in confirmation and vacatur applications. Instead, like the legislative history considered in *Suarez*, the FAA's legislative history shows that "no particular attention was directed to" the FAA's special venue provisions and that those provisions were "apparently never discussed in

committee reports or on the floor of either House." *Suarez*, 384 U.S. at 207. Nor, for that matter, was there any discussion of the venue provisions in the committee hearings on the proposed legislation.[13] In fact, there was no real debate or discussion of the FAA at all: the original statute was "drafted by a committee of the American Bar Association," H.R. Rep. No. 68-96, at 1 (1924), and it was passed with only minor amendments and debate. S. Rep. No. 68-536, at 1-2 (1924); *see generally* Ian R. MacNeil, *American Arbitration Law: Reformation, Nationalization and Internationalization* 107-09 (1992) (describing the FAA as "rubber-stamped legislation").

The legislative history does reveal one important fact: the FAA "follows the lines of the New York arbitration law enacted in 1920." S. Rep. No. 68-536 at 3; *accord Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing Before a Subcomm. of the Senate Comm. on the Judiciary*, 67th Cong., 4th Sess. at 3 (1923). This fact is significant because the 1920 New York arbitration statute did not contain any restrictions on venue. To the contrary, the New York statute provided that, in the absence of an agreement on venue, "the judgment [on an arbitration award] may be entered in any county." N.Y. Civil Practice Act § 1449, *reprinted in Clevenger's New York Practice* 615 (1922).

Although, the New York statute also contained provisions for the confirmation, modification, and vacatur of arbitration awards that closely resemble Sections 9, 10, and 11 of the

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[13] *See Arbitration of Interstate Commercial Disputes: Joint Hearings on S. 1005 and H.R. 646 before the Subcomms. of the Comms. on the Judiciary*, 68th Cong., 1st Sess. (1924); *Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing before a Subcomm. of the Senate Comm. on the Judiciary*, 67th Cong., 4th Sess. (1923).

FAA,[14] those provisions do not refer to the district in which the arbitration award was made. Instead, the New York statute states only that parties to an arbitration "may apply to the court specified in the submission [or agreement to arbitration] for an order confirming the award," N.Y. Civil Practice Act § 1456, *reprinted in Clevenger's New York Practice* 617, and that the "court specified in the submission must make an order" vacating, modifying, or correcting an award when the appropriate circumstances are present. *Id.* §§ 1457-58, *reprinted in Clevenger's New York Practice* 617-18. As the New York legislature obviously did not intend to prohibit applications to confirm, modify, or vacate in the absence of an agreement on venue, the venue provisions in the New York arbitration statute were clearly not intended to be exclusive. Since Congress presumably had the same intent when it patterned the FAA after the New York statute,[15] the legislative

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[14] *Compare* N.Y. Civil Practice Act § 1456 ("At any time within one year after the award is made, . . . any party to the submission [to arbitration] may apply to the court specified in the submission for an order confirming the award; and thereupon the court must grant such an order unless the award is vacated, modified or corrected, as prescribed in the next two sections."), *reprinted in Clevenger's New York Practice* 617 *with* 9 U.S.C. § 9 (providing that, if there is an agreement on venue, "at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title"); *compare* N.Y. Civil Practice Act § 1457 (providing that "the court specified in the submission must make an order vacating the award, upon the application of either party to the submission"), *reprinted in Clevenger's New York Practice* 617 *with* 9 U.S.C. § 10 (providing that "the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration").

[15] *See, e.g., Shannon v. United States*, 512 U.S. 573, 580-81 (1994) (noting the general rule that "adoption of the wording of a statute from another legislative jurisdiction carries with it" the legislative intent of that jurisdiction); *Metropolitan R.R. Co. v. Moore*, 121 U.S. 558, 571-72

history suggests that Congress did not intend Sections 9, 10, and 11 of the FAA to be exclusive.

This conclusion is consistent with, if not compelled by, the policies underlying the FAA. As this Court has recognized, the FAA announces a "statutory policy of rapid and unobstructed enforcement of arbitration agreements." *Moses H. Cone*, 460 U.S. at 23. The restrictive interpretation adopted by the court below would frustrate that policy by imposing a "pointless and wasteful burden on the supposedly summary and speedy procedures prescribed by the [FAA.]" *Id.* at 27.

First, that interpretation would complicate the arbitration process. As it now stands, parties often have difficulty agreeing where to hold arbitrations.[16] Making the location of the arbitration dictate the venue for future litigation would make it even more difficult to do so, because, as demonstrated above, there is often good reason to hold arbitrations in locations that are *not* convenient for future litigation. *See supra* p. 18. Moreover, if the location of the arbitration were to dictate the location of any ensuing litigation, the stakes of any decision to locate the arbitration hearings would be considerably higher, and the already frequently contentious disputes over this issue would inevitably become more intense and intractable.

Second, the interpretation adopted below would make applications to confirm or vacate arbitration awards more complicated and expensive. For example, when a case in federal court is stayed pending arbitration of one of the issues in that case, *see* 9 U.S.C. § 3, the arbitration is often conducted

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(1887) (applying rule to a New York statute).

[16] *Cf.* American Arbitration Association, *Commercial Dispute Resolution Procedures* Rule 11 <http://www.adr.org/rules/ commercial/commercial_ rules. html> (visited 10/24/99) (providing that the AAA will designate the location of arbitrations when agreement cannot be reached).

in another district.[17] If the FAA's special venue provisions were read to require that (absent an agreement) applications to vacate or confirm be filed in the district in which the award was made, an application to confirm the arbitration award could not always be brought in the district in which the stayed litigation was pending. However, as this Court observed more than fifty years ago, it is not "open to question that, where the court has authority under the statute . . . to make an order for arbitration, the court also has authority to confirm the award or to set it aside for irregularity, fraud, *ultra vires* or other defect." *Marine Transit Co. v. Dreyfus*, 284 U.S. 263, 275-76 (1932) (footnote omitted).

Similarly, where there is a forum-selection agreement, the interpretation adopted by the court below would not always permit applications to confirm and vacate an award to be brought in the same district. Under Section 9, an application to confirm may be filed in the district specified by the parties, or, if there is no agreement, in the district in which the award was made. *See* 9 U.S.C. § 9. Section 10, however, provides only for orders to vacate by the district in which the award was made. *See id.* § 10. Consequently, if these provisions were

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[17] *See, e.g., Sutter Corp. v. P & P Indus., Inc.*, 125 F.3d 914, 916 (5th Cir. 1997) (suit stayed in the Western District of Oklahoma; arbitration held in Dallas); *IDS Life Ins. Co. v. SunAmerica Securities, Inc.*, Nos. 95C 1204, 95 C 1212, 97 C 7857, 1999 WL 116220, at *2 , *4 (N.D. Ill. Feb. 26, 1999) (action stayed in Chicago; arbitration conducted in New York); *International Lithography Corp. v. Curro*, No. 96-7446, 1997 WL 633571, at *1 (E.D. Pa. Oct. 6, 1997) (action stayed in Pennsylvania; arbitration conducted in New Jersey); *United States ex. rel. Skip Kirchdorfer, Inc. v. Aegis/Zublin Joint Venture*, 869 F. Supp. 387, 390 (E.D. Va. 1994) (action stayed in Virginia; arbitration conducted in New York); *Elgart v. Sono-Tek Corp.*, No. 88-7539, 1989 WL 136280, at *1-*2 (E.D. Pa. Nov. 9, 1989) (action stayed in Pennsylvania; arbitration conducted in New York); *NII Metals Serv., Inc. v. ICM Steel Corp.*, 514 F. Supp. 164, 165 (N.D. Ill. 1981) (action stayed in Illinois; arbitration conducted in New York).

read to be exclusive, an application to vacate an arbitration award could not be heard in the same district as the corresponding application to confirm where the court specified by agreement was not in the district in which the award was made. However, as one treatise has recognized, "[i]t would be a singularly ill reading of the FAA for venue requirements ever to make it impossible for confirmation and vacation or modification proceedings to occur in the same court." IV MacNeil, *Federal Arbitration Law* § 38.4.1.3, at 38:51 to 38:52.

III. THE VAST MAJORITY OF COURTS AND COMMENTATORS HAVE CONCLUDED THAT THE FAA'S SPECIAL VENUE PROVISIONS ARE SUPPLEMENTED BY THE GENERAL VENUE STATUTE

In light of the plain language and the structure of the FAA, as well as the presumption that special venue statutes are supplemented by the general venue statute and the lack of any evidence of any contrary congressional intent, it should come as no surprise that most courts and commentators have adopted a permissive interpretation of the FAA's special venue provisions.

To date, at least five courts of appeals have squarely held that the FAA's special venue provisions are supplemented by the general venue statute. *See P & P Indus., Inc. v. Sutter Corp.*, 179 F.3d 861, 868-70 (10th Cir. 1999); *Apex Plumbing Supply, Inc. v. U.S. Supply Co.*, 142 F.3d 188, 191-92 (4th Cir. 1998); *Sutter Corporation v. P & P. Industries, Inc*, 125 F.3d 914, 919-20 (5th Cir. 1997); *In re VMS Sec. Litig.*, 21 F.3d 139, 143-45 (7th Cir. 1994); *Smiga v. Dean Witter Reynolds, Inc.*, 766 F.2d 698, 706 (2d Cir. 1985). Two others have agreed that the FAA's provisions are permissive. *See LaPrade v. Kidder Peabody & Co., Inc*, 146 F.3d 899, 903 n.4 (D.C. Cir. 1998) (citing *Apex* and *Smiga* for proposition that the FAA "does not provide that the district court loses venue if the

arbitration proceeds in another judicial district"), *cert. denied*, 119 S. Ct. 804 (1999); *Nordin v. Nutri/System, Inc.*, 897 F.2d 339, 344 (8th Cir. 1990) (noting that the language of Section 9 is permissive). And district courts in still two more circuits have done so as well. *See, e.g., Delta Dental of Rhode Island v. Dental Serv. of Massachusetts, Inc.*, 918 F. Supp. 46, 48-49 (D.R.I. 1996); *Elgart v. Sono-Tek Corp.*, No. 88-7539, 1989 WL 136280, at *2 (E.D. Pa. Nov. 9, 1989); *Todd Shipyards Corp. v. Cunard Line, Ltd.*, 708 F. Supp. 1440, 1446 n.20, 1447 n.24 (D.N.J. 1989).

Legal commentators have likewise rejected the restrictive interpretation of the FAA's venue provisions adopted by the court below. *See* IV MacNeil, *Federal Arbitration Law* § 38.3.1.2, at 38:34 (stating that Section 9 is "permissive . . . and does not limit venue to the courts noted therein"); *id.* § 38.4.1 at 38:49 to 38:54 (rejecting a mandatory interpretation of Sections 10 and 11); 1 Gabriel M. Wilner, *Domke on Commercial Arbitration* § 35:02, at 35-3 (rev. ed. 1998) ("Venue under the FAA provision governing vacation of the award is permissive, and venue for vacatur or confirmation of the award is the same."); Gary B. Born, *International Commercial Arbitration in the United States* 668 (1994) (concluding that the decisions adopting a permissive interpretation of the FAA's special venue provisions "appear better reasoned than those" adopting a restrictive interpretation); Susan C. Rabasca, Note, *Venue for Motions to Confirm or Vacate Arbitration Awards under the Federal Arbitration Act*, 57 Fordham L. Rev. 653, 655 (1989) (concluding that "the permissive view best conforms with Congress' intent when it enacted the Federal Arbitration Act"); Michael G. Schwartz & Amy Yip-Kikugawa, *Sunshine Beauty Supplies, Inc. v. United States District Court: Mandatory Venue and Motions to Confirm or Vacate under the Federal Arbitration Act*, 32 U.S.F. L. Rev. 629, 649-52 (1998) (same); Laurence J. Zielke, *Arbitrating Miller Act Claims and Problems in Enforcing an Award under the Federal Arbitration Act*, 24 Public Contract

L.J. 401, 412 (1995) (concluding that "[t]he better rule of law is that the language is permissive rather than mandatory").

Moreover, as Chief Judge Posner recently recognized, although three courts of appeals including the court below have taken a contrary view, the decisions of those courts "contain no arguments for their interpretation." *Landar Co. v. MMP Invs. Inc.*, 107 F.3d 476, 481 (7th Cir.), *cert. denied*, 118 S. Ct. 55 (1997); *see also P & P. Indus.*, 179 F.3d at 869-70 (noting that "none of the minority opinions contain any detailed analysis of the issue; each of the minority opinions rests its conclusion solely on citations to ostensibly applicable precedent"). For example, the Ninth Circuit's decision in *United States ex. rel. Chicago Bridge & Iron Co. v. Ets-Hokin Corp.*, 397 F.2d 935 (9th Cir. 1968), simply quotes Section 10 and asserts, without any explanation, that the "District Court of Arizona . . . was without jurisdiction to set aside the arbitration award" because the arbitration award was made in California. 397 F.2d at 938-39. Similarly, in *City of Naples v. Prepakt Concrete Co.*, the case on which the court below relied, the Fifth Circuit simply stated that "in view of § 9's command, and for reasons of judicial restraint and comity, the District Judge should have declined to enjoin the confirmation proceeding in the Ohio District Court." 490 F.2d at 184; *see also Sutter*, 125 F.3d at 919 (holding that *City of Naples* did not determine whether the FAA's venue provisions are exclusive).

Other appellate decisions holding the FAA's special venue provisions to be exclusive simply rely, without analysis or explanation, on prior decisions. *See Sunshine Beauty Supplies, Inc. v. United States District Court*, 872 F.2d 310, 312 (9th Cir. 1989) (relying upon *Central Valley Typographical Union No. 46 v. McClatchy Newspapers*, 762 F.2d 741, 744 (9th Cir. 1985), and *Ets-Hokin*); *McClatchy*, 762 F.2d at 744 (relying upon *Ets-Hokin*); *Island Creek Coal Sales Co. v. City of Gainsville, Florida*, 729 F.2d 1046, 1050 (6th Cir. 1984) (relying, among other things, upon *City of Naples* and *Ets-Hokin*). In short, the decisions of these courts of appeals and the court below that the FAA's special venue provisions exclude application of the general venue statute do not—and, for the reasons stated above, cannot—offer any persuasive justification for their conclusion.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Eleventh Circuit should be vacated, and the case remanded to the court of appeals.

Respectfully submitted,

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Supreme Court of the United States

CORTEZ BYRD CHIPS, INC.,

Petitioner,

v.

BILL HARBERT CONSTRUCTION COMPANY,
a division of Bill Harbert International, Inc.,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether venue of an action to vacate or modify an arbitral award under 9 U.S.C. §§ 10 or 11 lies in any district other than "the district wherein the award was made."

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STATEMENT OF THE CASE

Respondent Bill Harbert Construction Company, a division of Bill Harbert International, Inc., an Alabama corporation, ("BHC") is in the business of commercial construction. J.A. 4. BHC's principal place of business is in the State of Alabama. J.A. 4. In 1995, BHC entered into a contract with Petitioner Cortez Byrd Chips, Inc., a Mississippi corporation, ("Cortez Byrd") to erect a wood chip mill in Mississippi. J.A. 5. The contract required arbitration of any disputes between the parties under the Construction Industry Dispute Resolution Procedures of the American Arbitration Association ("AAA"). J.A. 5. The contract further provided that the arbitral award "shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof." J.A. 5.

Having suffered excess expenditures, labor, and overhead as a result of actions by Cortez Byrd and its designer and fabricator, BHC filed a demand for arbitration on April 30, 1997, with the AAA's Atlanta, Georgia office. J.A. 5. The AAA determined that the proceeding should be conducted in Birmingham, Alabama. J.A. 5-6. In November 1997, the arbitration panel conducted a four-day hearing in Birmingham, Alabama, during which testimony, other evidence, and arguments were presented by both parties.[1] J.A. 5-6.

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[1] Cortez Byrd contends that during the arbitration proceedings "counsel for respondent admitted that written change orders were not executed" and insists that "transcripts of the hearings" would verify this admission. Pet. Brief 5 and n.1. No hearing transcript was filed in either of the district court

On December 10, 1997, the arbitration panel made an award in favor of BHC and against Cortez Byrd, J.A. 62-63, under which Cortez Byrd owes BHC a net sum of $274,256.90, together with post-award interest at the rate of 10% per annum, J.A. 6.

On January 13, 1998, Cortez Byrd filed an action in the United States District Court for the Southern District of Mississippi (the "Mississippi district court") seeking to vacate or modify the award. J.A. 21. Rather than providing a basis for vacatur within the limitations of 9 U.S.C. § 10, Cortez Byrd's complaint alleged only that the award was incorrect – that is, that the arbitrators' decision disregarded the "facts" and was contrary to the parties' agreement. The complaint characterized the arbitral award as "illogical," "irrational," "an exhibition of bad faith," "of a grievously flawed character," "arbitrary and capricious," and "constitut[ing] the arbitrators' own private brand of justice." J.A. 21-26.

Unaware of the Mississippi district court filing, BHC filed the present action in the United States District Court for the Northern District of Alabama (the "Alabama district court") on January 20, 1998, to confirm the arbitral award. J.A. 4. Cortez Byrd responded on February 27,

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proceedings, and, consequently, there is no transcript of record. No transcript was provided to BHC or the arbitrators, much less "agreed by the parties to be, or determined by the arbitrator to be, the official record of the proceeding," as required by the AAA Construction Industry Dispute Resolution Procedures R-23. Moreover, the correctness of the arbitration award is not before this Court. Thus, Cortez Byrd's mischaracterization of the evidence before the arbitration panel is both inappropriate and unavailing.

1998 with an answer and counterclaim seeking vacatur of the award on the same grounds set forth in its complaint in the Mississippi district court. J.A. 8. Cortez Byrd also filed a motion to dismiss, transfer, or stay the Alabama district court action based on the pendency of the action in the Mississippi district court. J.A. 17. The Alabama district court denied this motion, holding it had exclusive jurisdiction over any action to confirm or vacate the award. Pet. App. 8a-10a.

On May 21, 1998, the Alabama district court confirmed the arbitral award and entered final judgment in favor of BHC. Pet. App. 11a-13a. The district court noted that Cortez Byrd "did not articulate a single legal ground pursuant to 9 U.S.C. § 10 by which the arbitration can be vacated (other than to plead, without evidentiary support, a "laundry list" of grounds in a purely conclusory manner)." Pet. App. 12a n.2.

Cortez Byrd complains in its brief – for the first time – that "the trial court entered judgment without permitting petitioner to submit any evidence. . . . " Pet. Brief 5 n.1. In fact, the record reveals no tender of evidence to the Alabama district court, no request for an evidentiary hearing, and no objection, by post-judgment motion or otherwise, that Cortez Byrd had insufficient time to make a record.[2]

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[2] Cortez Byrd's unfounded argument that it was not "permitted" to submit evidence is made in the hope that this Court will "take as true" Cortez Byrd's characterizations of the evidence presented to the arbitration panel. *See* Pet. Brief 5 n.1. Under *Walker Process Equip., Inc. v. Food Mach. & Chem. Co.*, 382 U.S. 172, 174-75 (1965), upon which Cortez Byrd relies for this

On appeal to the United States Court of Appeals for the Eleventh Circuit, Cortez Byrd did not challenge the Alabama district court's finding that it had failed to articulate a cognizable basis for vacatur of the arbitral award. Neither did Cortez Byrd contend that venue over BHC's confirmation action did not lie in the Alabama district court. Rather, Cortez Byrd argued only that the Alabama district court should have deferred to the Mississippi district court under the "first-to-file" rule. Cortez Byrd argued that venue was proper in both the Alabama and Mississippi district courts and that, because the Mississippi district court action was filed first, the "first-to-file" rule prohibited the Alabama district court from proceeding. The Eleventh Circuit Court of Appeals affirmed on the basis that the Northern District of Alabama was the exclusive forum for adjudication of the action. Pet. App. 1a.[3]

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position, an appellate court should "take as true" the allegations of a pleading dismissed by the trial court, where the issue on appeal is whether that pleading stated a cognizable claim. In this case, the only issues raised on appeal were venue and the "first-to-file rule." Thus, rather than "taking as true" Cortez Byrd's allegations of error in the arbitration proceedings, this Court should "take as true" the Alabama district court's determination that Cortez Byrd "did not articulate a single legal ground . . . by which the arbitration can be vacated. . . . " Pet. App. 12a n.2.

[3] At the time the Alabama district court entered judgment confirming the arbitral award, the Mississippi district court had neither entered any order confirming, modifying, or vacating the award, nor conducted any hearing for that purpose. On June 23, 1998, the Mississippi district court entered an order staying further proceedings pending issuance of a mandate by the Eleventh Circuit, and no further action has been taken in that case.

SUMMARY OF THE ARGUMENT

The meaning of statutory language cannot be determined in isolation, but must be read in the context of the statutory scheme as a whole. Comparing and contrasting FAA §§ 10 and 11 with parallel language in FAA §§ 4 and 9 establishes that Congress did not intend to authorize the filing of actions to vacate or modify arbitral awards either under the general venue statute or in any court designated in the arbitration agreement, but only in the district in which the arbitration award was made.

FAA § 4 expressly permits petitions to compel arbitration to be brought in any court that would have venue under the general venue statutes. The omission of this language from §§ 9, 10, and 11 must be regarded as intentional. By expressly authorizing the use of the general venue statute in § 4, but omitting such authorization from §§ 9, 10, and 11, Congress stated, in plain language, its intent for venue under §§ 9, 10, and 11 to be exclusive.

A similar analysis applies to the difference between the venue provision in § 9 and those of §§ 10 and 11. With respect to orders vacating or modifying an arbitration award, §§ 10 and 11 designate only the district in which the arbitration award was made. By contrast, § 9 permits the parties to provide in their arbitration agreements for the appropriate forum to confirm the award.

The use of the word "may" in §§ 10 and 11 does not support the argument that their venue provisions are permissive. §§ 10 and 11 provide that the specified court "may" vacate or modify the award, not that the parties "may" select the forum, and thus these sections do not suggest any discretion in the choice of forum. Moreover, a

number of other federal statutes have employed the word "may" to define and restrict jurisdiction and venue.

The FAA was modeled after a New York statute which, unlike the FAA, expressly provided for broad venue. By striking the broad venue provisions of the New York statute, which permitted judgment to be entered in "any county," and replacing them with the designation of only a single district court, Congress evidenced a clear intent to restrict venue.

The FAA was enacted to overcome the widely held view that arbitration awards were not enforceable in courts of law. The Act declared a national policy favoring arbitration and established a body of procedural rules for implementation of this policy in federal courts. In short, the FAA sought, not to broaden or restrict venue, but to define it in the first instance. Where venue is defined by the same statute that creates the right, such venue generally is intended to be exclusive.

The statutory policy of rapid and unobstructed enforcement of arbitration agreements established by the FAA is best served by exclusive venue of actions to vacate or modify arbitral awards. The determination by the arbitrator (or agreement of the parties) as to the most convenient forum should not be relitigated in district court.

Exclusive venue under §§ 9 and 10 of the FAA does not lead to "absurd results." Once a court proceeding under the FAA is instituted in the appropriate forum, venue is not forfeited by later proceedings. Therefore, a court entering a stay order under § 3 may later issue an order confirming or vacating an arbitration award, regardless of where the award was made.

Where specific venue statutes are intended to be exclusive, they cannot be supplemented by amendments to general venue statutes, absent a "clear intention" to do so. No post-1925 venue statute or amendment expresses any intention to modify the exclusive venue provisions of §§ 10 and 11 of the FAA.

ARGUMENT

Although this case was filed pursuant to § 9 of the Federal Arbitration Act (the "FAA" or the "Act"), 9 U.S.C. § 9 (Pet. App. 19a), only the venue provisions[4] of §§ 10 and 11, 9 U.S.C. §§ 10, 11 (Pet. App. 20a – 21a), are at issue here. Venue of this action unquestionably was proper, because the complaint was filed in "the United States court in or for the district within which [the arbitration] award was made," as provided in § 9. The question presented by this case is whether Cortez Byrd's complaint seeking vacatur or modification of the award under §§ 10 and 11 of the FAA was properly filed in the Mississippi district court. §§ 10 and 11 specify only that "the United States court in and for the district wherein the award was made may make an order" vacating, modifying, or correcting an arbitration award. Because the Southern District of Mississippi was not the situs of the arbitration proceedings, the issue is whether the designation of a particular court in §§ 10 and 11 is exclusive or

[4] Although some decisions speak in terms of "jurisdiction," it is now well settled that these sections establish venue, not subject matter jurisdiction. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 n.32 (1983).

whether it may be supplemented by the general venue statute, 28 U.S.C. § 1391.

Because the venue provisions of §§ 10 and 11 are exclusive, venue over Cortez Byrd's complaint seeking to vacate or modify the arbitration award does not lie in the Mississippi district court, and the Alabama district court properly disregarded that prior action in confirming the arbitration award. Even if the venue provisions of those sections were interpreted as permissive – that is, as merely supplementing the general venue statute, 28 U.S.C. § 1391 – venue still would lie in the Northern District of Alabama under FAA §§ 9, 10, and 11. In that event, however, an issue would arise as to whether the Alabama district court should have deferred to the Mississippi district court under the "first-to-file" rule. Because Cortez Byrd's Petition raised only the venue issue, the Alabama district court's discretion under the first-to-file rule will not be addressed in this brief.

The Circuit Courts are divided as to whether §§ 9, 10, and 11 provide for permissive or exclusive venue.[5] Like Cortez Byrd, courts finding these provisions to provide permissive venue reason that Congress's intent is revealed by the "plain meaning" of the word "may," and they posit that an exclusive reading of the provisions would lead to "absurd results." In fact, Congress's intent is revealed by the "plain language" of the statute as a whole, not by any single term. By comparing the venue provisions of §§ 10 and 11 with those of §§ 4 and 9 and

[5] Invariably, courts fail to differentiate between §§ 10 and 11, on the one hand, and the more permissive language of § 9, on the other.

applying established rules of statutory construction, it is clear that Congress intended the venue provisions of §§ 10 and 11 to be exclusive. The legislative history and purposes of the Act invariably lead to the same conclusion. Finally, there is no basis to conclude that any post-1925 amendments to the general venue statute, 28 U.S.C. § 1391, were designed to override this intent.

I. THE PLAIN MEANING OF THE STATUTORY LANGUAGE, READ IN CONTEXT, ESTABLISHES THAT THE VENUE PROVISIONS OF §§ 10 AND 11 WERE INTENDED TO BE EXCLUSIVE

Although the " 'starting point in every case involving construction of a statute is the language itself,' " *Watt v. Alaska*, 451 U.S. 259, 265 (1981) (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975)), "it is a 'fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used,' " *Textron Lycoming Reciprocating Engine Div., Avco Corp. v. United Auto., Aerospace, Agric. Implement Workers of Am., Int'l Union*, 523 U.S. 653, 118 S. Ct. 1626, 1629 (1998). Moreover, "[j]ust as a single word cannot be read in isolation, nor can a single provision of a statute." *Smith v. United States*, 508 U.S. 223, 234 (1993). "Statutory language must be read in context and a phrase 'gathers meaning from the words around it.' " *Jones v. United States*, 119 S. Ct. 2090, 2102 (1999) (quoting *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961)). In short, " 'statutory construction is a 'holistic endeavor.' A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory

scheme. . . . " *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988).

Indeed, even if a word or phrase can have more than one meaning out of context, the provision is not ambiguous if its meaning is made clear by other provisions of the statute: "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). Considering the language of the statute as a whole, the meaning of the venue provisions in §§ 10 and 11 is clear. In particular, comparing and contrasting these sections with parallel language in §§ 4 and 9 establishes that Congress did not intend to authorize the filing of actions to vacate or modify arbitral awards either under the general venue statute or in any court designated in the arbitration agreement, but only in the district in which the arbitration award was made. No contrary intention is indicated by the use of the word "may."

A. Comparison of §§ 10 and 11 with §§ 4 and 9 of the FAA Discloses Congress's Intent To Restrict Venue of Actions To Modify or Vacate Arbitration Awards

The clearest indication of Congress's intent is found in the striking contrast between the venue provisions of §§ 10 and 11 and those of §§ 4 and 9. It is well established that " 'where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts

intentionally and purposely in the disparate inclusion or exclusion.' " *Bates v. United* States, 522 U.S. 23, 118 S. Ct. 285, 290 (1997) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)); *accord BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537 (1994). In *Russello*, the Court concluded, as to the RICO provisions at issue:

> We refrain from concluding here that the differing language in the two subsections has the same meaning in each. We would not presume to ascribe this difference to a simple mistake in draftsmanship.

464 U.S. at 23.

In this case, the language included in FAA § 4, but "omitted" in §§ 10 and 11 is the very language Cortez Byrd suggests should be implicit in all the venue provisions of the FAA. § 4 provided in pertinent part as follows:

> That a party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate . . . **may petition any court of the United States which, save for such agreement, would have jurisdiction under the judicial code at law, in equity, or in admiralty of the subject matter of a suit arising out of the controversy between the parties**, for an order directing that such arbitration proceed in the manner provided for in such agreement.

Former 9 U.S.C. § 4 (1925) (emphasis added) (quoted in *Marine Transit Corp. v. Dreyfus*, 284 U.S. 263, 270 n.1

(1932)) (amended 1947 and 1954).[6] The "Judicial Code" is the name formerly applied to Title 28 of the United States Code, which contains the general venue provisions. Thus, under § 4 of the FAA, a petition to compel arbitration could be brought in any court that would have venue, absent the arbitration agreement, of a "suit arising out of the controversy between the parties." This language incorporating the general venue statutes was omitted from §§ 9, 10, and 11. Under the principles espoused in *Bates*, *Russello*, and countless other cases, this omission cannot be regarded as accidental.

It has been said that "[j]ust as one can speculate that Congress would have used stronger language [to provide for exclusive venue in FAA § 10], one can also surmise that if Congress had not intended to vest jurisdiction in one court it would have specified no court at all, or would have authorized 'any court of competent jurisdiction'. . . . " *Enserch Int'l Exploration, Inc. v. Attock Oil Co.*, 656 F. Supp. 1162, 1165 (N.D. Tex. 1987). As the language of § 4 illustrates, there is no such need for "speculation" or "surmise." By expressly authorizing the use of the general venue statute in § 4, but omitting such authorization from §§ 9, 10, and 11, Congress stated, in plain language, its intent for venue under §§ 9, 10, and 11 to be exclusive.

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[6] Current § 4 similarly permits the petition in "any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties." 9 U.S.C. § 4.

Moreover, the difference between the venue provision in § 9 and those of §§ 10 and 11 further demonstrates that Congress intended to limit venue of actions to vacate or modify arbitral awards to the district in which the award was made. With respect to orders vacating or modifying an arbitration award, §§ 10 and 11 designate only the district in which the arbitration award was made. By contrast, § 9 permits the parties to provide in their arbitration agreements for the appropriate forum to confirm the award.[7] Yet courts on both sides of this controversy have made the mistake of concluding that there is no basis for distinction among these provisions.[8]

The difference in the wording of § 9, on the one hand, and §§ 10 and 11, on the other, raises a question not previously addressed by the courts. If, as Cortez Byrd argues, Congress wished to expand venue by enactment of the FAA, why would it permit the parties to designate

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[7] Additionally, while §§ 10 and 11 use "may" in the sense of providing discretion to the designated court to modify or vacate the arbitration award, § 9 states that a party "may apply" to the court designated in the agreement or, in the absence of such an agreement, "may" make application in the district in which the award was made.

[8] *E.g.*, *Sutter Corp. v. P&P Indus., Inc.*, 125 F.3d 914, 919-20 (5th Cir. 1997) (§§ 9 and 10 both permissive); *In re VMS Sec. Litig.*, 21 F.3d 139, 145 (7th Cir. 1994) (§§ 9 and 10 both permissive); *Sunshine Beauty Supplies, Inc. v. United States Dist. Court*, 872 F.2d 310, 312 (9th Cir. 1989) (§§ 9 and 10 both exclusive). In *VMS*, the district court concluded that there was a "critical" difference in the language of §§ 9 and 10 and that while § 9 arguably could be permissive, § 10 could not. 21 F.3d at 142. While acknowledging that the wording of §§ 9 and 10 differs, the circuit court rejected the conclusion that the difference was "critical."

a forum for actions to confirm arbitral awards, but not for actions to modify or vacate them? The answer lies in the nature of these proceedings. A confirmation proceeding under § 9 is a summary proceeding to reduce the arbitration award to a judgment enforceable through execution or other collection proceedings. Once the award is authenticated, entry of a confirmation order is virtually a ministerial act. In sharp contrast, an action to modify or vacate an arbitral award under §§ 10 or 11 is a continuation of the dispute resolution process. While the scope of review is extremely limited, a proceeding under §§ 10 or 11 to vacate or modify an arbitration award is analogous to an appeal. Because an appeal generally must be filed in the same venue as the proceeding being challenged, it is not surprising that Congress deemed it appropriate for this same pattern to apply to review of arbitration proceedings and awards.

In any event, these differences in the sections of the FAA cannot be "ascribe[d] . . . to a simple mistake in draftsmanship." *Russello*, 464 U.S. at 23. Congress's omission from §§ 10 and 11 of the references to the general venue statutes and to any court designated in the parties' arbitration agreement is unmistakeable evidence that venue under §§ 10 and 11 is exclusive.

B. The Use of the Word "May" in §§ 10 and 11 Provides No Evidence of Congress's Intent

Rather than analyzing the statutory language in context, Cortez Byrd, like many of the decisions on which it relies, insists that Congress's intent is revealed by its use

of the word "may." This reliance is misplaced. As previously discussed, "a single word cannot be read in isolation" in interpreting a statute. With respect to the word "may," this Court has held:

> The word "may," when used in a statute, usually implies some degree of discretion. This common-sense principle of statutory construction is by no means invariable, however, . . . and can be defeated by indications of legislative intent to the contrary or by obvious inferences from the structure and purpose of the statute. . . .

United States v. Rodgers, 461 U.S. 677, 706 (1983) (citations omitted). The use of "may" in §§ 10 and 11 certainly cannot defeat the "obvious inferences" to be drawn from Congress's omission in §§ 10 and 11 of the broader venue provisions contained in §§ 4 and 9. Even if those differences could be disregarded, however, the use of "may" in §§ 10 and 11 would provide no insight into Congress's intentions as to venue.

As an initial matter, §§ 10 and 11 provide that the specified court "may" vacate or modify the award, not that the parties "may" select the forum. Thus, the word "may" does not "define which court is empowered to vacate an award," but "is properly employed to refer to the power or authority of the court to vacate an award." *Enserch*, 656 F. Supp. at 1165; *accord Tesoro Petroleum Corp. v. Asamera (South Sumatra) Ltd.*, 798 F. Supp. 400, 403-04 (W.D. Tex. 1992); *Soo Line R.R. Co. v. Chicago & N.W. Transp. Co.*, 737 F. Supp. 68, 69 (D. Minn. 1990). To illustrate, substitution of the "mandatory" terms "shall" or "must" in §§ 10 or 11 (*i.e.*, the designated court "*shall*

make an order") would eliminate the court's discretion without further restricting the venue.

Moreover, comparison of the FAA with venue provisions in other federal statutes does not suggest that Congress intended a permissive reading of the FAA. Courts finding the venue provisions of §§ 9, 10, and 11 of the FAA to be permissive often are suffering from the delusion that "when Congress intends for one specific district court to be the exclusive forum for a certain matter, it uses unambiguous language to express its intention." *P&P Indus., Inc. v. Sutter Corp.*, 179 F.3d 861, 869 (10th Cir. 1999).[9] In fact, a number of other federal statutes have employed the word "may" to define and restrict venue.[10]

The venue provision for patent infringement actions, at issue in *Stonite Prods. Co. v. Melvin Lloyd Co.*, 315 U.S. 561 (1942), and *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222 (1957), provided:

> Any civil action for patent infringement **may be brought** in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business.

[9] *Accord Apex Plumbing Supply, Inc. v. U.S. Supply Co.*, 142 F.3d 188, 192-93 (4th Cir.), *cert. denied*, 119 S. Ct. 178 (1998); *In re VMS Sec. Litig.*, 21 F.3d 139, 144 (7th Cir. 1994); *Smiga v. Dean Witter Reynolds, Inc.*, 766 F.2d 698, 706 (2d Cir. 1985), *cert. denied*, 475 U.S. 1067 (1986).

[10] Indeed, in *NII Metals Servs., Inc. v. ICM Steel Corp.*, 514 F. Supp. 164, 166 (N.D. Ill. 1981), one of the seminal decisions finding § 9 to be permissive, the court conceded that a permissive interpretation required "some strain on the normal reading of the first two sentences of § 9 – by treating the word 'may' in the second sentence as permissive and not exclusive."

28 U.S.C. § 1400(b) (emphasis added). In holding that this language was exclusive, this Court reasoned that the section

> was adopted to define the exact jurisdiction of the federal courts in actions to enforce patent rights and thus eliminate the uncertainty produced by the conflicting decisions on the applicability of the [general venue statute] to such litigation. That purpose indicates that Congress did not intend [this provision] to dovetail with the general provisions relating to the venue of civil suits, but rather that it alone should control venue in patent infringement proceedings.

Stonite, 315 U.S. at 565-66.

Similarly, this Court found the venue provision of the National Bank Act, 12 U.S.C. § 94, to be mandatory "despite the presence of what might be regarded as permissive language." *Citizens & S. Nat'l Bank v. Bougas*, 434 U.S. 35, 38 (1977). That section provides that suits against national banks "**may be had**" in the federal district court for the district where such association is established. 12 U.S.C. § 94 (emphasis added). This Court held that "[t]he phrase 'suits . . . may be had' was, in every respect, appropriate language for the purpose of specifying the precise courts in which Congress consented to have national banks subject to suit. . . . " *Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555, 560 (1963). The interpretation of this statute as exclusive was compelled by the "basic principle of statutory construction that a statute dealing with a narrow, precise, and specific subject . . . 'will not

be controlled or nullified by a general one, regardless of the priority of enactment.' " *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976) (quoting *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974)).

Title VII of the Civil Rights Act of 1964 also provides for exclusive venue using the term "may." The venue provision of Title VII states that an action "**may be brought**" in certain venues related to the alleged violation, "but if the respondent is not found within any such district, such an action **may be brought** within the judicial district in which the respondent has his principal office." 42 U.S.C. § 2000e-5(f)(3) (emphasis added). This Court has found this provision to be exclusive. *E.E.O.C. v. Arabian Am. Oil Co.*, 499 U.S. 244, 256 (1991) (stating that § 2000e-5(f)(3) "provide[s] for venue only in" the designated districts). Circuit courts reaching this conclusion have reasoned that where venue is defined by the same statute that creates the right, it is intended to be exclusive. *Bolar v. Frank*, 938 F.2d 377, 378 (2d Cir. 1991) ("venue for Bolar's right of action is circumscribed by the very statute that gives her the right to sue in the first place"); *Stebbins v. State Farm Mut. Auto. Ins. Co.*, 413 F.2d 1100, 1102 (D.C. Cir.), *cert. denied*, 396 U.S. 895 (1969) ("The venue of the right of action here in suit was limited by the statute which created the right.").

As these examples illustrate, the assumption that Congress provides for exclusive venue only with unambiguous language is simply mistaken. In light of Congress's clear manifestation of intent through its disparate inclusions and omissions of broader language in §§ 4, 9, 10, and 11, the use of "may" in §§ 10 and 11 cannot be

regarded as creating an ambiguity, much less as proving a permissive intent.

II. THE LEGISLATIVE HISTORY AND PURPOSE OF THE FEDERAL ARBITRATION ACT ESTABLISH THAT ITS VENUE PROVISIONS WERE INTENDED TO BE EXCLUSIVE

The legislative history of the FAA offers little specific guidance in determining proper venue under §§ 9, 10, or 11. Neither the House report nor the Senate report discusses these sections at length, and neither addresses the issue of venue.[11] Two critical facts are revealed by the legislative history, however. The first is that the FAA was modeled after a New York statute which, unlike the FAA, expressly provided for broad venue. The second is that the venue provisions were enacted as part of the original legislation – that is, that venue was "circumscribed by the very statute that gives . . . the right to sue in the first place." *Bolar v. Frank*, 938 F.2d 377, 378 (2d Cir. 1991) (interpreting 42 U.S.C. § 2000e-5(f)(3)). These circumstances establish that exclusive venue was intended. Moreover, the policy of "rapid and unobstructed enforcement of arbitration agreements," *Moses H. Cone*, 460 U.S.

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[11] H.R. Rep. No. 68-96 (1924); S. Rep. No. 68-536 (1924). Cortez Byrd argues that the Congress's intention in enacting the FAA in 1925 is somehow disclosed by the legislative history of the 1970 legislation implementing the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. § 201 *et seq.* Pet. Brief 15-16. This argument is defeated by this Court's ruling that "the view of a later Congress cannot control the interpretation of an earlier enacted statute." *O'Gilvie v. United States*, 519 U.S. 79, 90 (1996).

at 23, is best served by exclusive venue, which simplifies and streamlines post-arbitration proceedings.

A. Comparison of the FAA with the New York Statute After Which It Was Modeled Establishes an Intention To Restrict Venue

The FAA was drafted by a committee of the American Bar Association, H.R. Rep. No. 68-96 at 1 (1924), and "follows the lines of the New York arbitration law enacted in 1920," S. Rep. No. 68-536 at 3 (1924). The venue provisions of the two acts, however, are substantially different. The provisions in the New York statute that paralleled §§ 9, 10, and 11 authorized the "court specified in the submission [*i.e.*, the arbitration agreement]" to enter an order confirming, vacating, or modifying the award. Former N.Y. Civil Practices Act §§ 1456-58.[12] The New York statute further provided, however, that if no court was specified in the submission, "the judgment may be entered in any county." Former N.Y. Civil Practices Act § 1449. In contrast, FAA § 9 provides that in the absence of an agreement, an application to confirm the award may be made in the district in which the award was made. FAA §§ 10 and 11 make no provision for an agreement between the parties, but provide only that the district court for the district in which the award was made may vacate or modify the award.

Cortez Byrd argues that because "the venue provisions in the New York arbitration statute were clearly not

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[12] This statute is reprinted in *Clevenger's New York Practice* (1922).

intended to be exclusive," "Congress presumably had the same intent when it patterned the FAA after the New York statute." Pet. Brief 29. In effect, Cortez Byrd is arguing that because the FAA and the New York statute on which it was modeled have **different** venue provisions, they must be read to have the **same** meaning. Not surprisingly, *Shannon v. United States*, 512 U.S. 573 (1994), on which Cortez Byrd relies, does not support this proposition. This Court in *Shannon* noted the "general rule that adoption of the wording of a statute from another legislative jurisdiction carries with it the previous judicial interpretations of the wording." The Court held, however, that no such presumption applied where the statute at issue did not "borrow" the terms of the model statute, but departed from it in "significant ways." 512 U.S. at 581.

Indeed, where language of a model act is stricken or changed, courts presume instead that a different meaning was intended:

> Where a legislature models an act on another statute but does not include a specific provision in the original, a strong presumption exists that the legislature intended to omit that provision. *See, e.g., Bank of America v. Webster*, 439 F.2d 691, 692 (9th Cir. 1971) ("We cannot assume that the omission [in the Guam Code of Civil Procedure of a provision in the California Code on which it was based] was not deliberate or that Guam intended to add by general provision that which it had deleted from specific enumeration."); *Crane Co. v. Richardson Constr. Co.*, 312 F.2d 269, 270 (5th Cir. 1963) (citing *Peterman v. Floriland Farms, Inc.*, 131 So. 2d 479, 480 (Fla. 1961)) (Florida Supreme Court held legislature's adoption

> of only a portion of another state's statute creates strong presumption of legislative intent to omit from Florida law the disregarded portion of the earlier statute).

Kirchner v. Chattanooga Choo Choo, 10 F.3d 737, 738-39 (10th Cir. 1993). Therefore, by striking the broad venue provisions of the New York statute, which permitted judgment to be entered in "any county," and replacing them with the designation of only a single district, Congress evidenced a clear intent to restrict venue.

B. The FAA Venue Provisions Were Intended Neither To Expand nor Limit Venue, but To Establish Procedures and Define Venue in the First Instance

The intention to limit venue to the designated district also is consistent with the intent and purpose of the FAA. As this Court explained in *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995), the FAA was enacted in 1925 to direct courts to enforce arbitration agreements:

> [T]he basic purpose of the Federal Arbitration Act is to overcome courts' refusals to enforce agreements to arbitrate. See *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 474, 109 S. Ct. 1248, 1253, 103 L. Ed. 2d 488 (1989). The origins of those refusals apparently lie in " 'ancient times,' " when the English courts fought " 'for extension of jurisdiction – all of them being opposed to anything that would altogether deprive every one of them of jurisdiction.' " *Bernhardt v. Polygraphic Co. of America, Inc.*, 350 U.S. 198, 211, n.5, 76 S. Ct. 273, 280, n.5, 100

> L.Ed. 199 (1956) (Frankfurter, J., concurring) (quoting *United States Asphalt Refining Co. v. Trinidad Lake Petroleum Co.*, 222 F. 1006, 1007 (SDNY 1915, in turn quoting *Scott v. Avery*, 5 H.L. Cas. 811 (1856) (Campbell, L.J.)). . . . [W]hen Congress passed the Arbitration Act in 1925, it was "motivated, first and foremost, by a . . . desire" to change this antiarbitration rule. *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 220, 105 S. Ct. 1238, 1242, 84 L. Ed. 2d 158 (1985). It intended courts to "enforce [arbitration] agreements into which parties had entered," *ibid.* (footnote omitted), and to "place such agreements 'upon the same footing as other contracts,' " *Volt Information Sciences, Inc., supra*, 489 U.S., at 474, 109 S. Ct., at 1253 (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511, 94 S. Ct. 2449, 2453, 41 L. Ed. 2d 270 (1974)).

513 U.S. at 270-72.

Thus, the venue provisions in the FAA were not enacted to clarify or change existing venue provisions for actions to enforce, vacate, or modify arbitration awards. Rather, because of the widely held view that such a right of action did not exist under common law, the Act not only "declared a national policy favoring arbitration," *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984), but also established a body of procedural rules for implementation of this policy in federal courts. In short, the FAA sought, not to broaden or restrict venue, but to define it in the first instance.

Where venue is defined by the same statute that creates the right, such venue generally is intended to be exclusive. *Bolar v. Frank*, 938 F.2d 377, 378 (2d Cir. 1991) ("Venue for Bolar's right of action is circumscribed by the

very statute that gives her the right to sue in the first place"); *Stebbins v. State Farm Mut. Auto. Ins. Co.*, 413 F.2d 1100, 1102 (D.C. Cir.), *cert. denied*, 396 U.S. 895 (1969) ("The venue of the right of action here in suit was limited by the statute which created the right."). This principle is a variation of the maxim *"Expressio unius est exclusio alterius."* While this maxim certainly must be applied with caution,[13] it has particular application where a statute establishes a new cause of action or remedy not found in common law:

> "When what is expressed in a statute is creative, and not in a proceeding according to the course of the common law, it is exclusive, and the power exists only to the extent plainly granted. Where a statute creates and regulates, and prescribes the mode and names the parties granted right to invoke its provisions, that mode must be followed and none other, and such parties only may act."
>
> The method prescribed in a statute for enforcing the rights provided in it is likewise presumed to be exclusive.

2A Norman J. Singer, *Sutherland Statutory Construction* § 47.23 at 216-17 (5th ed. 1992) (citations omitted).

Therefore, by specifying a particular court for proceedings to confirm, vacate, or modify arbitration awards, Congress intended to exclude others.

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[13] *Ford v. United States*, 273 U.S. 593, 612 (1927) (maxim is " 'often a valuable servant, but a dangerous master to follow' " (citation omitted)).

C. Congress's Intent To Facilitate Enforcement of Arbitral Awards Is Best Served by Limiting Venue of Actions To Vacate or Modify Such Awards

Aside from focusing on the word "may" out of context, courts that adopt a permissive reading of the venue provisions of FAA §§ 9, 10, and 11 most often justify their decisions on grounds of expediency, variously denominated in terms of "judicial economy," "absurd results," "pointless and wasteful burdens," and the like. *E.g., In re VMS Sec. Litig.*, 21 F.3d 139, 144-45 (7th Cir. 1994). Particularly in the face of unambiguous statutory language and other unmistakable evidence of Congress's intent, such considerations are out of place in interpreting venue statutes. As this Court has found, " 'The requirement of venue is specific and unambiguous; it is not one of those vague principles which, in the interest of some overriding policy, is to be given a "liberal" construction.' " *Leroy v. Great Western United Corp.*, 443 U.S. 173, 184 n.18 (1979) (quoting *Olberding v. Illinois Cent. R. Co.*, 346 U.S. 338, 340 (1953)). Even in matters of expediency, however, a permissive reading of §§ 10 and 11 falls short.

1. *Venue should not be relitigated.* The "statutory policy of rapid and unobstructed enforcement of arbitration agreements" established by the FAA, *Moses H. Cone*, 460 U.S. at 23, is best served by interpretation of the venue provisions of §§ 10 and 11 as they were intended – that is, as defining the exclusive venue for actions to vacate or modify arbitral awards. If the parties are unable to reach agreement as to the location for an arbitration hearing, the dispute is resolved by the arbitrator, taking into account such matters as the convenience of the parties,

witnesses, and the arbitrator, and the availability of records and other evidence. *See, e.g.*, AAA Construction Industry Dispute Resolution Procedures F-9. This determination by the arbitrator (or agreement of the parties) as to the most convenient forum should not be relitigated in district court.

If the statute permitted a party seeking vacatur of the award to select a different forum for its own convenience, the entire issue of venue would be reopened. Following a race to the courthouse, courts would be faced with motions and possible appeals with respect to the discretionary "first-to-file" rule and the more convenient forum. To avoid a "pointless and wasteful burden on the supposedly summary and speedy procedures prescribed by the [FAA]," *Moses H. Cone*, 460 U.S. at 27, the arbitrator's or parties' determination of the most appropriate forum for resolution of the dispute should be foreclosed from further litigation.

As the *Enserch* court held:

> Congress' choice of the U.S. court in the district where the award was made as the appropriate forum is consistent with the character of arbitration as a dispute resolution device. Arbitration is "an opportunity generally to secure prompt, economical and adequate solution of controversies." *See Wilko v. Swan*, 346 U.S. 427, 438, 74 S. Ct. 182, 188, 98 L.Ed. 168 (1953) [*overruled on other grounds, Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 466 (1989)]. The district wherein the award is made presumably is a reasonable forum for effecting such a prompt, economical, and adequate solution.

656 F. Supp at 1165 n.8. The court in *Central Valley Typographical Union No. 46 v. McClatchy Newspapers*, 762 F.2d 741, 744 (9th Cir. 1985), similarly noted: "A rule laying venue where the arbitration is held . . . recognizes that the parties already have indicated that the location is mutually convenient to settle their dispute."

2. *Exclusive venue does not lead to "absurd results."* Contrary to Cortez Byrd's arguments and those of a number of courts seeking to justify a permissive reading of the statutes,[14] exclusive venue under §§ 9 and 10 of the FAA does not lead to "absurd results." According to this "absurdity" theory, a mandatory reading of §§ 9 or 10 would render § 3 of the FAA "meaningless," because a § 3 "stay" order entered in a forum other than where arbitration would occur could only lead to ultimate dismissal.[15] The resulting inability of the court with jurisdiction over the controversy to "proceed[ ] with the matter to its conclusion" is said to be "wasteful" and inconsistent "with principles of judicial economy."[16]

These arguments disregard the fundamental principle that venue requirements must be satisfied only at the institution of the action and that the court retaining jurisdiction does not lose venue by virtue of later developments. *LaPrade v. Kidder Peabody & Co.*, 146 F.3d 899, 906

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[14] *E.g., P&P Indus., Inc. v. Sutter Corp.*, 179 F.3d 861, 868-70 (10th Cir. 1999); *In re VMS Sec. Litig.*, 21 F.3d 139, 144-45 (7th Cir. 1994).

[15] *E.g., P&P Indus.*, 179 F.3d at 869; *VMS*, 21 F.3d at 144; *Purdy v. Monex Int'l Ltd.*, 867 F.2d 1521, 1523 (5th Cir. 1989), *cert. denied*, 493 U.S. 863 (1989).

[16] *E.g., VMS*, 21 F.3d at 145.

n.4 (D.C. Cir. 1998), *cert. denied*, 119 S. Ct. 804 (1999). As the court held in *LaPrade*, "once venue was established in regard to institution of the lawsuit, *see Minnesota Mining & Mfg. Co. v. Eco Chem., Inc.*, 757 F.2d 1256, 1264 (Fed. Cir. 1985), the district court did not lose venue because the parties arbitrated elsewhere." *Id.* Similarly, in *Smiga v. Dean Witter Reynolds, Inc.*, 766 F.2d 698, 706 (2d Cir. 1985), *cert. denied*, 475 U.S. 1067 (1986), the court held: "Once a federal court has subject matter jurisdiction over an action, it may confirm an arbitration award even though it was not the district where the award was granted."

In *Baltimore & O. C. T. R. Co. v. Wisconsin Cent. Ltd.*, 154 F.3d 404 (7th Cir. 1998), the court explained:

> [T]here is another [jurisdictional issue]: whether the district judge had jurisdiction over the case when it came back to him after the arbitration. There is no doubt that he had jurisdiction over it when it was originally filed and that he was empowered by the Federal Arbitration Act to stay it pending arbitration. 9 U.S.C. § 3. The issuance of a stay, as distinct from an order of dismissal, implies that the proceeding in the court that issued the stay remains on the court's docket, albeit in a state of suspended animation. As long as the case remains before the court, the judge has the power to issue any order that is within his power to issue in a case of that sort. And that includes an order confirming an arbitration award. . . .

Id. at 407.

Indeed, this Court more than fifty years ago observed that it is not "open to question that, where the court has authority under the [FAA] . . . to make an order for

arbitration, the court also has authority to confirm the award or to set it aside for irregularity, fraud, ultra vires, or other defect." *Marine Transit Corp. v. Dreyfus*, 284 U.S. 263, 275-76 (1932). Because the court entering a stay order under § 3 retains jurisdiction over the proceeding and does not "lose venue," the concern that exclusive venue would render § 3 a nullity is unfounded.

The same principle defeats Cortez Byrd's argument that if the arbitration agreement designates a different forum for confirmation proceedings than the district where the arbitration hearing occurred, competing §§ 9 and 10 motions could not be heard in the same court. Pet. Brief 31-32. Once a proceeding under either section is filed in the appropriate district, the court thereby obtaining jurisdiction may enter an order under either provision.[17] Therefore, the supposition that exclusive venue would lead to "absurd results" simply has not been well considered.

3. *Exclusive venue leaves no "venue gap."* Cortez Byrd also contends that an exclusive interpretation of the FAA's venue provisions would create an impermissible "venue gap." Cortez Byrd argues that under this interpretation, in the absence of an agreement, "FAA as originally enacted would not have provided for the enforcement of any arbitrations conducted outside this country. . . . " Pet. Brief at 16. This argument is without

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[17] In this sense, Cortez Byrd's hypothetical is no different from a claim and compulsory counterclaim that would be subject to different venue provisions, if filed as separate actions. Once a complaint is filed in a proper forum, the compulsory counterclaim is not subject to a venue objection.

foundation. Although Congress certainly contemplated arbitration of international disputes, Cortez Byrd has been unable to demonstrate that the Act was intended to authorize courts in the United States to enter orders confirming, vacating, or modifying foreign arbitral awards.

"It is a longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.' " *E.E.O.C. v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (citation omitted). Even the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention"), 9 U.S.C. § 201 *et seq.*, does not authorize courts in the United States to vacate or modify foreign arbitral awards. *Tesoro Petroleum Corp. v. Asamera (South Sumatra) Ltd.*, 798 F. Supp. 400, 404-05 (W.D. Tex. 1992). Rather, the Convention provides that if a proceeding is brought to enforce an award, enforcement may be "refused" if the requisite showing is made. Convention Art. V.[18]

III. AMENDMENTS TO 28 U.S.C. § 1391 WERE NOT INTENDED TO MODIFY THE EXCLUSIVE VENUE UNDER §§ 10 AND 11 OF THE FAA

Where specific venue statutes are intended to be exclusive, they cannot be supplemented by amendments to general venue statutes, absent a "clear intention" to do

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[18] In contrast, the Convention authorizes a "competent authority of the country in which the award was made" to "set aside" the award. Convention Art. V ¶ 1(e).

so. *Radzanower v. Touche Ross & Co.*, 426 U.S. 148 (1976). As this Court held in *Radzanower*:

> It is a basic principle of statutory construction that a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum. "Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." *Morton v. Mancari*, 417 U.S. 535, 550-51, 94 S. Ct. 2474, 2482, 41 L. Ed. 2d 290, 301. "The reason and philosophy of the rule is, that when the mind of the legislator has been turned to the details of a subject, and he has acted upon it, a subsequent statute in general terms, or treating the subject in a general manner, and not expressly contradicting the original act, shall not be considered as intended to affect the more particular or positive previous provisions, unless it is absolutely necessary to give the latter act such a construction, in order that its words shall have any meaning at all." T. Sedgwick, The Interpretation and Construction of Statutory and Constitutional Law 98 (2d ed. 1874).
>
> . . . Thus, unless a "clear intention otherwise" can be discerned, the principle of statutory construction discussed above counsels that the specific venue provisions of § 94 are applicable to the respondent bank in this case. *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222, 77 S. Ct. 787, 1 L. Ed. 2d 786.

426 U.S. at 153.

No post-1925 venue statute or amendment expresses any intention to modify the exclusive venue provisions of

§§ 10 and 11 of the FAA. In fact, the general venue provisions of 28 U.S.C. § 1391 expressly provide that they apply "except as otherwise provided by law." Therefore, rather than a clear intention to control specific venue statutes, 28 U.S.C. § 1391 indicates an intention to preserve venue schemes under existing special statutes.

Cortez Byrd does not address this principle of *Radzanower*. Rather, Cortez Byrd cites *Pure Oil Co. v. Suarez*, 384 U.S. 202 (1966) ("*Suarez*"), and *Monument Builders v. American Cemetery Ass'n*, 891 F.2d 1473, 1477 (10th Cir. 1989), *cert. denied*, 495 U.S. 930 (1990), for the proposition that "special venue statutes are supplemented by [the] more liberal general venue statute, absent specific contrary indication." Pet. Brief at 19 (quoting *Monument Builders*). *Suarez* does not so hold, and this quotation from *Monument Builders* is simply a mischaracterization, in *dicta*, of the *Suarez* holding.

Were it not for Cortez Byrd's description of *Suarez* as "indistinguishable" from this case, the decision would merit little discussion. The issue in *Suarez* was expressly limited to the effect of the definition of corporate "residence" found in 28 U.S.C. § 1391(c) on the previously enacted specific venue provision in the Jones Act, which permitted suit where the defendant "resides." The Jones Act venue statute provided that venue "shall be under the court of the district in which the defendant employer **resides** or in which his principal office is located." 46 U.S.C. § 688. The general venue statute provided:

> [A] corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and **such judicial district shall be regarded as the residence of such corporation for venue purposes.**

Former 28 U.S.C. § 1391(c) (emphasis added) (amended 1988). The sole issue in *Suarez* was whether "this definition of residence is applicable to the Jones Act venue provision." 384 U.S. at 204.

The Court found that this redefinition of corporate residence was intended "to bring venue law in tune with modern concepts of corporate operations" and saw nothing in the legislative history of the Jones Act "to indicate that its framers meant to use 'residence' as anything more than a referent to more general doctrines of venue rules, which might alter in the future." Accordingly, the Court concluded:

> [T]he liberalizing purpose underlying . . . enactment [of § 1391(c)] and the generality of its language support the view that it applies to all venue statutes using residence as a criterion, at least in the absence of contrary restrictive indications in any such statute.

384 U.S. at 204-05.[19]

The *Suarez* decision has no application to the issue before this Court. Sections 10 and 11 of the FAA do not

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[19] The patent venue statute at issue in *Stonite Prods. Co. v. Melvin Lloyd Co.*, 315 U.S. 561 (1942), and *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222 (1957), was held to be an exception to this ruling on the basis that its legislative history contraindicated an expanding definition of residency.

base venue on the residence of any party.[20] Moreover, contrary to Cortez Byrd's arguments, the *Suarez* holding cannot be generalized into a "presumption that special venue statutes are supplemented by the general venue statute." Pet. Brief 24. Rather, under the later *Radzanower* decision, specific venue statutes control over general venue statutes unless a contrary intention is clearly shown. No such showing can be made.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Eleventh Circuit should be affirmed.

Respectfully submitted,

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[20] In fact, since the *Suarez* decision, 28 U.S.C. § 1391(c) has been further amended to provide that its definition of residency applies only to "venue under this chapter [*i.e.*, Title 28, Chapter 87]."

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IN THE

Supreme Court of the United States

CORTEZ BYRD CHIPS, INC.,

Petitioner,

v.

BILL HARBERT CONSTRUCTION COMPANY,
A DIVISION OF BILL HARBERT INTERNATIONAL, INC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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REPLY BRIEF FOR PETITIONER

Petitioner demonstrated in its opening brief that the special venue provisions of the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.*, are permissive in nature and do not preclude application of the general venue statute to requests to confirm, vacate, or modify arbitration awards. This conclusion is dictated by the permissive language of these provisions and confirmed by the contrasting use of mandatory language elsewhere in the FAA, by the overall structure and purpose of the Act, and by Congress' historical treatment of venue. *See* Pet. Br. at 11-19. This conclusion is also supported by the presumption, applied by this Court in *Pure Oil Co. v. Suarez*, 384 U.S. 202 (1966), that special venue provisions supplement the general venue statute. *See* Pet. Br. at 19-34. Based upon these considerations, the vast majority of courts and commentators have likewise concluded that the FAA's venue provisions are permissive. *See id.* at 32-35.

Respondent Bill Harbert Construction Company does not cast serious doubt upon the conclusion that the FAA's special venue provisions are permissive. Indeed, respondent's brief either concedes or does not dispute most of the points made in the opening brief. Moreover, none of the arguments advanced by respondent reconciles its restrictive interpretation with the plain language of the FAA or with the presumption applied by this Court in *Suarez*.

1. Although this Court has admonished parties that, in interpreting a statute, one must "look first to its language, giving the words used their ordinary meaning," *Moskal v. United States*, 498 U.S. 103, 108 (1990) (quotations and citations omitted), respondent does not seriously challenge petitioner's analysis of the language of the FAA's special venue provisions.

As petitioner demonstrated, the FAA's special venue provisions state where a party "may" apply to confirm an arbitration award (9 U.S.C. § 9) and where an order vacating or modifying an award "may" be made (*id.* §§ 10-11). The ordinary,

everyday meaning of this language is indisputably permissive. *See* Pet. Br. at 12. Moreover, it is clear from the context that Congress was using this language in its ordinary, permissive sense because elsewhere in Section 9 itself and in the rest of the FAA Congress uses mandatory language such as "shall" or "must" to indicate mandatory requirements. *See id.* at 13 & n.3 (discussing 9 U.S.C. §§ 2-4, 6, 9, 12-13); *see also United States ex rel. Siegel v. Thoman*, 156 U.S. 353, 359 (1895) (noting that, when used "'in special contradistinction'" to mandatory language, the word "may" must be given its ordinary, permissive meaning). A permissive interpretation is also consistent with Congress' practice of using unambiguously restrictive language in special venue statutes that it intends to be exclusive (*see* Pet. Br. at 13-14 & nn. 4-6); with the structure of the FAA, which would be subject to a venue gap and to irrational distinctions under a restrictive interpretation (*see id.* at 15-17); and with the common sense assumption that Congress intended to permit actions to vacate or confirm arbitration awards to be brought in convenient venues such as the district where the defendant resides (*see id.* at 17-19).

Most of these points are unchallenged. Indeed, the only aspect of petitioner's textual analysis that respondent contests is the demonstration that a restrictive interpretation of the FAA's special venue provisions would create a venue gap by prohibiting the application of the original portions of the FAA to arbitrations conducted abroad. *See* Pet. Br. at 16; *see also id.* at 15 & n.5 (noting later amendments implementing international arbitration conventions). Respondent does not, however, explain how the FAA's special venue provisions apply to such arbitrations under its interpretation. Instead, it argues that the FAA as originally enacted did not apply to foreign arbitrations at all. *See* Resp. Br. at 30. This position is untenable. As petitioner pointed out, the original provisions of the Act expressly encompass contracts involving "commerce . . . with foreign nations." 9 U.S.C. § 1 (defining "commerce"); *see also id.* § 2 (providing for enforcement of arbitration

agreements in transactions involving "commerce"). Moreover, this Court has applied the original provisions of the Act to an agreement to conduct an arbitration in Paris. *See Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 508, 519-20 (1974). Thus, respondent's restrictive interpretation clearly does create a venue gap.

2. In supposed support of its restrictive interpretation, respondent points to language in Section 4 of the FAA that is not contained in the Act's special venue provisions. According to respondent, Section 4 contains "the very language [petitioner] suggests should be implicit in all the venue provisions of the FAA," and because that language is not included in Sections 9, 10, and 11, those sections should be read to preclude application of the general venue statute. Resp. Br. at 11-12. In fact, however, the passage in question does not even deal with venue.

The passage cited by respondent authorizes a party seeking to compel performance of an arbitration agreement to "petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties." 9 U.S.C. § 4. Respondent's contention that this passage somehow relates to venue is mystifying. In referring to "*jurisdiction . . . of the subject matter* of a suit," the passage plainly deals with subject matter jurisdiction, not venue. *See, e.g., Lindahl v. OPM*, 470 U.S. 768, 793 & n.30 (1985) (noting that subject matter jurisdiction is the "power to adjudicate" while venue is the "place where judicial authority may be exercised"). It makes no difference that Title 28 contains the general venue provisions, *see* Resp. Br. at 12, because that Title also contains the subject matter jurisdiction statutes. *See* 28 U.S.C. §§ 1330-68.

Equally meritless is respondent's assertion that, if Congress had not intended to restrict venue to a single court, "it would have specified no court at all, or would have authorized 'any

court of competent jurisdiction.'" Resp. Br. at 12 (quotation omitted). As petitioner explained, Congress had good reason to choose a third option: supplementing the general venue statute. *See* Pet. Br. at 17-18. When the FAA was enacted in 1925, courts frequently refused to enforce forum selection clauses, *see, e.g.*, *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 19 (1972), and the general venue statute did not authorize suits outside the district of the defendant's residence. *See* 28 U.S.C. § 112(a) (1926 ed.) (providing only for residential venue). As a consequence, in order to ensure that applications to confirm, vacate, or modify arbitration awards could be brought in districts specified by the parties and in the districts in which those awards were made as well as in the district in which the defendant resided, Congress needed to supplement the general venue statute. Thus, a permissive interpretation resulting in limited supplementation of the general venue statute makes perfect sense.

By contrast, the restrictive interpretation advanced by respondent makes little sense because it would prevent applications to confirm, vacate, or modify arbitration awards from being brought in the district where the defendant resides — the one venue that is almost always convenient for the defendant. *See* Pet. Br. at 18-19. Notably absent from respondent's brief is any explanation for why Congress would have wanted to prohibit applications to confirm, vacate, or modify arbitration awards where the defendant resides.

3. Respondent also argues that the special venue provisions in Sections 10 and 11 are exclusive of the general venue statute because the language of those sections differs from that of Section 9. *See* Resp. Br. at 13-16. This argument is meritless as well.

a. Under Section 9, parties who "have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration" and who "specify the court" to enter that award may apply to the court so specified for

confirmation of an arbitration award. 9 U.S.C. § 9. As Sections 10 and 11 do not contain an analogous provision, respondent speculates that Congress viewed confirmation of arbitration awards as "virtually a ministerial act" and applications to vacate or modify arbitration awards as analogous to appeals. Resp. Br. at 14. Respondent does not, however, offer any evidence or authority in support of this speculation. Moreover, it fails to reconcile this argument with its contention that all three venue provisions are restrictive.

b. Respondent also argues that, as used in Sections 10 and 11, the word "may" does not identify the court that may vacate or modify an award but instead relates to "the power or authority of the court to vacate [or modify] an award." Resp. Br. at 15 (quotation omitted). Respondent is, however, unable to point to any restrictive language in these sections supporting its restrictive interpretation. More fundamentally, under a restrictive interpretation, an application to confirm the award cannot be brought in the same court as an application to vacate or modify that same award in certain cases, *see* Pet. Br. at 31-32, an absurd result that has been rejected by "[e]very federal circuit court to address the issue, whether or not it holds that the FAA authorizes more than one federal court to confirm or vacate arbitration awards." *P & P Indus., Inc. v. Sutter Corp.*, 179 F.3d 861, 868 (10th Cir. 1999). Accordingly, Sections 10 and 11 should be interpreted to be in harmony with the plainly permissive venue requirements of its statutory neighbor Section 9 — which is exactly what is required by respondent's recognition of the principle that "statutory construction is a holistic endeavor." Resp. Br. at 9 (quotation omitted).

4. As the opening brief showed, even if the language of the FAA's special venue provisions, the structure of the Act, and common sense did not dictate a permissive interpretation of the FAA's special venue provisions, a permissive interpretation would still be compelled by the presumption applied by this Court in *Suarez* that special venue provisions supplement the

general venue statute. *See* Pet. Br. at 19 & n.11, 24-26. In response, respondent does not — and cannot — assert that this presumption has been rebutted here. Instead, it argues that there is no such presumption and that, in fact, the opposite presumption controls. These arguments are baseless.

Respondent dismisses this Court's decision in *Suarez* by noting that the precise issue before the Court in that case was whether the special venue provision in the Jones Act, 46 U.S.C. § 688 *et seq.*, incorporates the definition of corporate residence in the general venue statute. *See* Resp. Br. at 32-34. Petitioner did not, however, argue that the holding in *Suarez* was directly on point. Instead, petitioner demonstrated that *Suarez* presumed that the special venue provision in the Jones Act was supplemented by the general venue statute and that this same reasoning is applicable in this case. *See* Pet. Br. at 24-26. Nothing in respondent's brief casts doubt upon this simple but crucial point.

Respondent also fails to cast any doubt upon the validity of the presumption that special venue statutes supplement the general venue statute. As the opening brief explained, this presumption is supported by three factors: (1) Congress' historical practice of enacting special venue provisions "'to widen plaintiffs' venue choices,'" *id.* at 20 (quoting *Howe v. Goldcorp Invs., Ltd.*, 946 F.2d 944, 950 (1st Cir. 1991) (Breyer, C.J.)); (2) the principle that statutes should be interpreted to "'regard each other as effective,'" *id.* at 23 (quoting *Vimar Seguros Reaseguros v. M/V Sky Reefer*, 515 U.S. 528, 533 (1995)); and (3) the unacceptable patchwork of arcane and antiquated exceptions that would result if the hundreds of special venue statutes enacted by Congress were interpreted restrictively, *see id.* at 23-24. Respondent does not dispute any of these points. Moreover, while it accuses the Tenth Circuit of mischaracterizing the holding in *Suarez*, *see* Resp. Br. at 32, it does not deny that courts and commentators alike have recognized the presumption that special venue

statutes supplement the general venue statute. *See* Pet. Br. at 19 & n.11 (listing authorities).

In opposition to the presumption that special venue statutes supplement the general venue statute, respondent invokes a canon of statutory construction: the principle that a specific statute normally controls a more general one. *See* Resp. Br. at 31. This canon does not, however, conflict with the presumption that special venue statutes supplement the general venue statute for the simple reason that the presumption is used in construing the special, not the general, venue statute. Indeed, in *Suarez*, this Court recognized that the Jones Act's venue provision, as the more specific statute, governs application of the general venue statute. *See Suarez*, 384 U.S. at 203 (noting that the "Jones Act . . . ultimately governs the venue issue before us"). Thus, respondent's invocation of the canon that the specific governs the general begs the question before this Court, which is whether the FAA's special venue provisions were intended to be exclusive.

This Court's decision in *Radzanower v. Touche Ross & Co.*, 426 U.S. 148 (1976), does not overrule *Suarez* or otherwise cast doubt upon the presumption that special venue statutes supplement the general venue statute. In *Radzanower*, a national banking association based in Boston was sued in the Southern District of New York for alleged securities violations based upon the relatively broad special venue provision in the 1934 Act. *See* 426 U.S. at 150 (discussing 15 U.S.C. § 78aa). When the bank moved to dismiss under the narrower venue provisions then-applicable to national banks, *see* 12 U.S.C. § 94 (1976 ed.), this Court held that the latter provision, which was "mandatory and exclusive," was more specific and therefore controlled. 426 U.S. at 150, 152-58. *Radzanower* did not consider the application of the general venue statute or this Court's prior opinion in *Suarez*, and respondent fails to explain how this Court's reasoning in *Radzanower* has any bearing on the interpretation of the FAA's special venue provisions.

Respondent also argues that the FAA's special venue provisions are presumably exclusive because the FAA "establishe[d] a new cause of action or remedy not found in common law." Resp. Br. at 24. Once again, respondent's argument is based upon a mistaken premise: the FAA did not establish a cause of action unknown at common law. As petitioner has already pointed out, while common law courts were reluctant to specifically enforce agreements to arbitrate, "arbitration awards, unlike agreements to arbitrate, were specifically enforced at common law." Pet. Br. at 3. Indeed, this Court specifically enforced an arbitration award over seventy years before the passage of the FAA. *See Burchell v. Marsh*, 58 U.S. (17 How.) 344, 349 (1854); *see generally* IV Ian R. MacNeil *et al.*, *Federal Arbitration Law* § 38.2.2, at 38:22 (1999) (noting that, at the time the FAA was enacted, "in both state and federal courts, arbitration awards were fully enforceable in court").

There is no basis for respondent's claim that "[w]here venue is defined by the same statute that creates the right, such venue generally is intended to be exclusive." Resp. Br. at 23. Although the D.C. Circuit has stated that venue under Title VII is "limited by the statute which created the right," *Stebbins v. State Farm Mut. Auto. Ins. Co.*, 413 F.2d 1100, 1102 (D.C. Cir.) (per curiam), *cert. denied*, 396 U.S. 895 (1969), that statement represented the Court's conclusion, not its rationale, and the other case on which respondent relies for its claim simply paraphrases this conclusion. *See Bolar v. Frank*, 938 F.2d 377, 378 (2d Cir. 1991). Moreover, contrary to respondent's assertion, *see* Resp. Br. at 24, the *exclusio unius est exclusio alterius* canon of construction cannot support the weight of respondent's newly-minted rule because, as this Court has long held, that canon applies only where the meaning of a statute is otherwise unclear. *See, e.g.*, *SEC v. C.M. Joiner Leasing Corp.*, 320 U.S. 344, 350-51 (1943) (noting that the canon is "subordinated to the doctrine that courts will construe the details of an act in conformity with its dominating purpose,

will read text in light of context and will interpret the text so far as the meaning of the words fairly permits so as to carry out in particular cases the generally expressed legislative policy").

Finally, if, as respondent suggests, the FAA were interpreted to create a narrow, expedited statutory cause of action whose procedures "must be followed and none other," Resp. Br. at 24 (quotation omitted), respondent would not be able to rely upon the Act's venue provisions because it failed to follow the procedures established by the statute. Under the FAA, "[a] party initiates judicial review of an arbitration award not by filing a complaint in the district court, but rather by filing either a petition to confirm the award or a motion to vacate or modify the award." *Booth v. Hume Publishing, Inc.*, 902 F.2d 925, 932 (11th Cir. 1990).[1] Respondent, however, commenced this case with the filing of a complaint and the issuance of a summons rather than an application to confirm and a notice of motion, and petitioner did the same in Mississippi. J.A. 1, 4-6, 21-26. Thus, if the FAA's provisions are to be strictly enforced, the proceedings before this Court must be treated as common law rather than statutory proceedings, *see generally* I Ian R. MacNeil *et al.*, *Federal Arbitration Law* § 9.10 (1999) (discussing the survival of common law actions), and the FAA's special venue provisions are inapplicable here.

5. Respondent also seeks support for its restrictive interpretation in the legislative history of the FAA. *See* Resp. Br. at 20-22. As this Court has repeatedly recognized, however, "when a statute speaks with clarity to an issue, judicial inquiry into the statute's meaning, in all but the most extraordinary

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[1] *See also* 9 U.S.C. § 9 (requiring a "[n]otice of the application" to be served in the manner prescribed for "service of notice of motion"); *id.* § 13 (noting that a party seeking to confirm, modify, or correct an arbitration award "*mov*[*es*] for an order confirming, modifying, or correcting an award" and that an order confirming an arbitration award is enforced "*as if* it had been rendered in an action") (emphasis added).

circumstances, is finished." *Metropolitan Stevedore Co. v. Rambo*, 515 U.S. 291, 295 (1995). Under such circumstances, there must at a minimum be a "clearly expressed legislative intent to the contrary" in order to justify a departure from the clear meaning of a statute. *United States v. Turkette*, 452 U.S. 576, 580 (1981) (quotation omitted). Here, respondent concedes (as it must) that the legislative history "offers little specific guidance in determining proper venue under §§ 9, 10, or 11." Resp. Br. at 19. As a consequence, the legislative history cannot overcome the clear meaning established by the language of the FAA's special venue provisions, the structure of the Act, and the historical context. For the same reason, the legislative history cannot provide the clear evidence of congressional intent necessary to overcome the presumption that special venue provisions supplement the general venue statute.

Even if the legislative history were relevant, it would not offer respondent's restrictive interpretation any support. As petitioner demonstrated, the language in Sections 9, 10, and 11 was modeled after provisions in the New York's 1920 arbitration law, which were permissive in nature. *See* Pet. Br. at 28-29 & n.14. Instead, respondent asserts that, because the New York law contained a provision not found in the FAA permitting entry of judgment in any county, Sections 9, 10, and 11 of the FAA should be given a restrictive interpretation. *See* Resp. Br. at 20-22 (discussing N.Y. Civil Practice Act § 1449, *reprinted in Clevenger's New York Practice* 615 (1922)). In other words, according to respondent, language that is permissive in the New York law should be given the *opposite* meaning in Sections 9, 10, and 11 of the FAA because the FAA does not borrow a *different* provision in the New York statute. This assertion turns on its head the principle that "adoption of the wording of a statute from another legislative jurisdiction carries with it" the legislative intent of that jurisdiction. *Shannon v. United States*, 512 U.S. 573, 580-81 (1994).

Nor does the sole authority that respondent cites in support of this assertion suggest otherwise. In *Kirchner v. Chattanooga Choo Choo*, 10 F.3d 737 (10th Cir. 1993), the Tenth Circuit considered whether a right of action for damages could be implied into Oklahoma's residential landlord and tenant act. Because that act was modeled after the Uniform Residential Landlord and Tenant Act, 7B U.L.A. 430 (1985), but did not include a provision in the uniform act expressly authorizing damage claims, the Tenth Circuit concluded that such damages were not available under the Oklahoma law. *See Kirchner*, 10 F.3d at 738-39. Respondent does not even begin to explain how this innocuous ruling supports the bizarre inference respondent would have this Court draw.

Not surprisingly, respondent also ignores the most natural explanation for omission of the provision in question from the FAA. According to that provision, an agreement to submit an existing dispute to arbitration could "provide that a judgment of a specified court shall be rendered upon the award made pursuant to the submission" and, in the absence of such a specification, "the judgment may be entered in any county." N.Y. Civil Practice Act § 1449, *reprinted in Clevenger's New York Practice* 615 (1922) (brackets omitted); *see also* II Ian R. MacNeil *et al.*, *Federal Arbitration Law* § 17.1.2, at 17:5 to 17:6 (1999). It would, however, have been obviously inefficient and unfair to include an analogous provision in the FAA authorizing venue in any district in the nation. As a consequence, Congress had to change the default rule, and it was perfectly logical for Congress to make the general venue statute the default by omitting Section 1449 from the FAA.

6. Citing three special venue provisions, respondent points out that Congress does not always use unambiguous language when it intends venue to be exclusive. *See* Resp. Br. at 16-19. In each of these provisions, however, Congress' intent to restrict venue was clear. As just the opposite is true here, these cases offer respondent little support.

This Court has long held that the special venue provision for patent infringement suits, 28 U.S.C. § 1400(b), is exclusive of the general venue statute based upon the clear and unambiguous legislative history of that provision. *See, e.g.*, *Fourco Glass Co. v. Transmitta Prods. Corp.*, 353 U.S. 222 (1957); *Stonite Prods. Co. v. Melvin Lloyd Co.*, 315 U.S. 561 (1942). Before this provision was enacted, the lower courts were divided over the scope of venue in patent infringement suits. *See Stonite*, 315 U.S. at 564-65. In response to this "great uncertainty," Congress enacted a bill "intended to remove this uncertainty *and to define the exact jurisdiction of the circuit courts in these matters*." 29 Cong. Rec. 1900-01 (1897) (statement of Rep. Mitchell) (emphasis added). Recognizing the resulting special venue provision to be a "restrictive measure, limiting a prior, broader venue," this Court held that this provision "alone should control venue in patent infringement proceedings." *Stonite*, 315 U.S. at 566-67. This ruling offers respondent's interpretation no support because, as respondent itself concedes, "[t]he legislative history of the FAA offers little specific guidance in determining proper venue under §§ 9, 10, or 11." Resp. Br. at 19.

This Court has also held that the special venue provision formerly governing actions against national banks, *see* Act of Feb. 18, 1875, ch. 80, 18 Stat. 316, 320,[2] was exclusive. *See, e.g.*, *Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555 (1963); *Citizens & Southern Nat'l Bank v. Bougas*, 434 U.S. 35, 38 (1977); *Radzanower*, 426 U.S. at 152. The purpose of that provision required it to be exclusive: the provision was

[2] In 1982, this provision was replaced by a narrower (and explicitly mandatory) one. *See* Pub. L. No. 97-320, § 406, 96 Stat. 1512 (codified at 12 U.S.C. § 94) (providing that "[a]ny action or proceeding against a national banking association for which the Federal Deposit Insurance Corporation has been appointed receiver . . *shall* be brought" in the district or county where the association's principal place of business is located) (emphasis added).

enacted to prevent the "untoward interruption of a national bank's business that might result from compelled production of bank records for distant litigation." *Citizens & Southern Nat'l Bank*, 434 U.S. at 48; *see also* S. Rep. No. 97-536, at 28 (1982), *reprinted in* 82 U.S.C.C.A.N. 3054, 3082 ("The special venue provision was originally intended to prevent the inconvenience and the interruption of business that might occur if centrally located bank records were sent to distant courts."). Respondent cannot claim that any similar protective intent motivated the FAA's special venue provisions, especially given that its restrictive interpretation would in some cases prohibit applications to confirm, vacate, or modify from being brought in the district in which a defendant resides. *See supra* p. 4. Moreover, respondent's suggestion that these cases turned upon the canon that the specific controls the general has no basis: although *Radzanower* mentioned the canon, it did so *after* noting that the special venue provision in question was mandatory. *See Radzanower*, 426 U.S. at 152-53; *see also supra* p. 7.

This Court has also indicated (in unexplained dictum) that Title VII's venue provision, 42 U.S.C. § 2000e-5(f), is exclusive of the general venue statute. *See EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 256 (1991). Congress' intent to exclude application of the general venue statute is implicit in the structure of Title VII's special venue provision: as the leading lower court decision on the issue noted, this comprehensive statute designates three separate judicial districts with relations to employment discrimination claims, and, where none of these districts are available, it provides for a form of residential venue that is "significantly more restrictive" than the general venue statute. *See Stebbins*, 413 F.2d at 1102-03.[3] By

[3] Title VII's special venue provision states in pertinent part:

> an action may be brought in any judicial district in the State in which the unlawful unemployment practice is alleged to have been

contrast, the special venue provisions in the FAA are limited in nature and make no mention of residential venue. Thus, as with the other two special venue provisions cited by respondent, the restrictive reading given Title VII's provision has little relevance here.

7. Respondent asserts in its brief that the policies underlying the FAA are best served by reading the FAA's venue provisions to be exclusive of the general venue statute. *See* Resp. Br. at 6, 25. That is incorrect. The rigid and restrictive interpretation advanced by respondent is undermined, not bolstered, by policy considerations because it fails to ensure a sensible venue, conflicts with the policies of the FAA, and would in some cases lead to absurd results.

a. Petitioner demonstrated in the opening brief that arbitrations are not always conducted in districts that are convenient for litigating applications to confirm, vacate, or modify an arbitration award and that an exclusive interpretation of the FAA's venue provision would require such applications to be brought in inconvenient venues. *See* Pet. Br. at 18. As a case may only be transferred on grounds of inconvenience to another venue "where it might have been brought" initially, 28 U.S.C. § 1404(a), this means that respondent's restrictive interpretation of the FAA's special venue provisions would impose a rigid and inflexible rule upon applications to confirm, vacate, or modify arbitration awards, requiring them (in the absence of a forum selection agreement) to be litigated in the district in

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committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found in any such district, such an action may be brought within the judicial district in which the respondent has his principal office.

42 U.S.C. § 2000e-5(f)(3).

which the award was made no matter how inconvenient that district may be. Although respondent does not deny that its interpretation would lead to its result, it does not attempt to explain why Congress would have intended this result or even why Congress would have wanted to prohibit applications to confirm, vacate, or modify arbitration awards from being brought in the district in which the sued party resides. *See supra* p. 4. As a consequence, respondent has failed to show that its restrictive interpretation yields a sensible venue rule.

b. The rigid interpretation advanced by respondent would also conflict with the policies underlying the FAA. In the first place, this interpretation would unnecessarily complicate the arbitration process. As previously pointed out, parties often have difficulty agreeing where to hold arbitrations. *See* Pet. Br. at 30. Making the location of the arbitration determine the venue of any subsequent judicial proceedings would only raise the stakes, making already contentious disputes even more intractable (*see id.*) — which is, no doubt, why the American Arbitration Association's rules require parties to an arbitration to "consent[] that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereof." American Arbitration Association, *Commercial Dispute Resolution Procedures* Rule 50(c) <http://www.adr.org/rules/commercial/commercial_rules.html> (visited Dec. 22, 1999).

The restrictive interpretation advanced by respondent would also impose a "pointless and wasteful burden on the supposedly summary and speedy procedures prescribed by the [FAA]" in many cases. *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp*, 460 U.S. 1, 27 (1983). As previously demonstrated, this interpretation would require applications to confirm to be brought in different districts from applications to vacate or modify where a forum-selection clause designates a venue besides the one in which the arbitration was conducted. *See* Pet. Br. at 31-32. Although such piecemeal litigation is

plainly contrary to the policies underlying the FAA, respondent does not dispute that the restrictive interpretation it advances would require separate applications under such circumstances.

Respondent denies that its interpretation would require piecemeal litigation where a suit is stayed in favor of arbitration and the arbitration is not conducted in the district in which that suit is pending. *See* Resp. Br. at 27-29. Respondent does not, however, deny that its interpretation, standing alone, leads to this result. *See* Pet. Br. at 30-31. Instead, respondent contends that this result is avoided due to the principle that a district court "retaining jurisdiction does not lose venue by virtue of later developments." Resp. Br. at 27. In other words, in order to avoid the absurd result that a party obtaining a stay in favor of arbitration cannot return to the court issuing the stay to confirm any resulting award, respondent carves out an exception to its restrictive interpretation. These interpretive gymnastics underscore the more sensible and internally consistent nature of a permissive interpretation of Sections 9, 10, and 11.

c. Respondent argues that the "determination by the arbitrator . . . as to the most convenient forum" should not be "relitigated in the district court." Resp. Br. at 26. Respondent does not, however, explain how the question of venue is litigated in arbitration. The procedure for determining the location of an arbitration is limited and informal: when there is an objection to the locale requested by the claimant, the parties submit written statements, and the conflict is resolved based upon the papers by a AAA officer. *See* I Thomas H. Oehmke, *Commercial Arbitration* § 26:13 (rev. ed. 1999). More fundamentally, the AAA does not determine where it is most convenient to litigate an application to confirm, vacate, or modify an arbitration award; it determines where it is most convenient to conduct an arbitration. Thus, the process by which the location of an arbitration is determined is hardly a

substitute for a judicial determination of the proper venue for proceedings in federal court.

Furthermore, there is no reason to think that the limited benefit that a rigid, inflexible venue rule would bring in deterring venue disputes would outweigh the many costs of a restrictive interpretation would impose in complicating the arbitration process in some cases, in requiring piecemeal litigation in others, and in forcing applications to confirm, vacate, or modify to be brought in inconvenient venues in still other cases. While all of these costs are unnecessary and wasteful, any motion practice concerning the proper venue would, by contrast, serve the positive purpose of ensuring that applications to confirm, vacate, or modify arbitration awards are not wastefully litigated in inconvenient venues. In addition, the courts are more than capable of fashioning presumptive rules, such as the first-filed doctrine, minimizing the cost of such motions practice. Thus, while arbitrators should determine the proper location for arbitrations, courts should determine the proper venue for any ensuing judicial proceedings.[4]

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[4] Although respondent acknowledges that the only issue before this Court is whether the courts below correctly found the FAA's venue provisions to be exclusive, *see* Resp. Br. at 4 n.2, 8, it urges this Court to "'take as true'" the district court's conclusory determination that petitioner had failed to state a cognizable challenge to the arbitration award in this case. *Id.* at 4 n.2. It is telling, however, that respondent does not even attempt to explain how the arbitration panel could, consistent with the terms of the contract in this case, have awarded an upward adjustment based upon a fictitious change order or why an award that arbitrarily disregards the terms of a contract cannot be vacated under the FAA. *See* Pet. Br. at 7 n.2 (noting that arbitration awards that do not draw their essence from the contract at issue are subject to *vacatur*).

CONCLUSION

For the foregoing reasons, and those stated in petitioner's opening brief, the judgment of the United States Court of Appeals for the Eleventh Circuit should be vacated, and the case remanded to the court of appeals.

Respectfully submitted,

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